Petition

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MILDRED RHOADES, Individually and as Administratrix of the Estate of Claude Rhoades, deceased,	
Respondent,	PETITION FOR A WRIT OF CERTIORARI TO THE
v.	SUPREME COURT OF THE STATE OF UTAH
JAMES C. WRIGHT, also known as JAMES CLIFFORD WRIGHT, and CLIFFORD WRIGHT and ESSIE WRIGHT, his wife,	
Petitioners.	

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Utah, entered in the above-entitled case on November 26, 1980, a rehearing of which was denied May 18, 1981.

QUESTIONS PRESENTED

1. Whether the exercise of quasi in rem jurisdiction by a Utah court over a Colorado resident, where the only contact with the forum state is the ownership and use of real property, which ownership and use are unrelated to the cause of action, denies petitioners' due process rights under the Fourteenth Amendment of the United States Constitution.

2. Whether the Full Faith and Credit Clause of the United States Constitution requires the Supreme Court of the State of Utah to recognize and give effect to the final judgment of the Colorado State court that respondent's claim is barred.

3. Whether the findings by the Utah Supreme Court that respondent is a Utah resident, and as to the nature and extent of petitioners' use of land in Utah, absent an evidentiary hearing, denies petitioners' rights of due process under the Fifth and Fourteenth Amendments of the United States Constitution.

4. Were petitioners denied their procedural due process rights through application of the Utah pre-judgment attachment rule without opportunity for a prior hearing.

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CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah is reported at 622 P. 2d 343 (Utah 1980). A copy of this opinion and the order denying rehearing are reprinted in Appendix B.

JURISDICTIONAL STATEMENT

The Judgment of the Supreme Court of Utah was entered November 26, 1980. Appendix B. Rehearing was denied May 18, 1981. Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment, United States Constitution:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law;

2. The Due Process Clause of the Fifth Amendment, United States Constitution:

> [N]or be deprived of life, liberty, or property, without due process of law;

3. Article IV, Section 1, United States Constitution:

> Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other State.

STATEMENT OF THE CASE

On April 19, 1970, respondent's husband, Claude Rhoades, was killed in the state of Colorado by petitioner James C. Wright. It is undisputed that all petitioners at all times material were residents of the state of Colorado. Mildred Rhoades, (hereinafter respondent), first brought an action for wrongful death against petitioners in the United States District Court for the District of Utah. That action was dismissed when, on appeal to the Tenth Circuit Court of Appeals, it was held that the Utah federal trial court could not exercise in personam jurisdiction over petitioners. The Court of Appeals held that petitioners did not have sufficient minimum contacts with Utah to support jurisdiction consistent with traditional notions of fair play and substantial justice. (See unpublished per curiam decision, Appendix A.) Subsequently, in July, 1974, respondent simultaneously filed two wrongful death actions against petitioners in the state courts of Utah and Colorado. The Colorado action was dismissed on the grounds that respondent failed to bring the action within the two-year, substantive, statute of limitations for wrongful death actions in Colorado. The judgment was not appealed and became final. Appendix A.

This Utah action was then pursued by respondent. The Seventh Judicial District Court, San Juan County, Utah, granted petitioners' motion to vacate respondent's writ of attachment as a method of conferring jurisdiction. That decision was reversed by the Utah Supreme Court in *Rhoades v. Wright*, 552 P.2d 131 (Utah 1976), (hereinafter Rhoades I). Following remand and reinstatement of the writ, petitioners appeared specially and moved to quash service of process or alternatively to dismiss plaintiff's action. This motion was based, *inter alia*, on the claim that the Utah state court lacked quasi in rem jurisdiction over petitioners. (R. 8)

On August 9, 1978, the State trial court issued a memorandum decision dismissing respondent's action for failure to file within the two-year period of the Colorado statute of

limitations, and declining to rule on the jurisdictional challenge raised by petitioners. (R. 75) Respondent appealed to the Utah Supreme Court. Petitioners argued that the due process clause of the United States Constitution, as interpreted and applied by the United States Supreme Court in *Shaffer v. Heitner*, 433 U.S. 196 (1977), precluded the excercise of quasi in rem jurisdiction by Utah courts.

The Utah Supreme Court held that the Utah state courts could exercise quasi in rem jurisdiction over petitioners consistent with due process. In particular, the court held that ownership of farm property in Utah by petitioners, accompanied by its use, was a sufficient contact with the forum, although said real property and its use were unrelated to respondent's claim. See Appendix B.

REASONS FOR GRANTING THE WRIT

I.

THE EXERCISE OF JURISDICTION BY THE COURTS OF UTAH DENIES PETITIONERS' RIGHTS OF DUE PROCESS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The decision by the Utah Supreme Court in the instant case directly conflicts with the pronouncements of this Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and denies petitioners' rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

In *Shaffer*, this Court held that the exercise of quasi in rem jurisdiction must be within the constraints of due process as tested by the "minimum contacts" rationale of *International Shoe Co. v. Washington*, 326, U.S. 310 (1945). The Utah court misapplied this standard, and in so doing extended state court jurisdiction over nonresidents well beyond the limits of due process as defined in *Shaffer*.

In *Shaffer* this Court held that where there are insufficient contacts between the forum state and defendant to confer in personam jurisdiction, then likewise, there can be no quasi in rem jurisdiction. The test for the two being the same. As stated in *Rush v. Savchuk*, 444 U.S. 320 (1980):

> In *Shaffer v. Heitner*, we held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

444 U.S. at 327 (emphasis added). In the federal action brought by respondent, the Tenth Circuit Court of Appeals applied the International Shoe "minimum contacts" test and held that there could be no exercise of in personam jurisdiction over petitioners in Utah. (See unpublished per curiam decision, Appendix A). Thus, given identical facts, the Utah Supreme Court found jurisdiction where the Tenth Circuit Court of Appeals held there was none. Clearly, one of these courts applied the wrong standard. Petitioners contend that the Utah Supreme Court is in error for the reasons hereinafter set forth.

The Utah court placed undue emphasis on the relationship between the forum and respondent (plaintiff) rather than analyzing the relation between the forum and petitioners (defendants). The Utah court stated that due process analysis includes a measurement of the interest of the forum in adjudicating the dispute:

> The implicit interest of Utah is, of course, in assuring that heirs, . . . have the opportunity, to recover compensation for the wrongful death of a Utah resident. (Citation omitted)
>
> * * *
>
> Utah's interest is even stronger in this case because Utah must be viewed as the last forum available to plaintiff. . . . We are mindful that plaintiff

> has attempted to litigate her claim both in the United States District Court for Utah and the Colorado District [State] Court. However, in neither case was plaintiff permitted to reach the merits of her claim. This fact, coupled with the fact that quasi in rem jurisdiction of the type involved here is jurisdiction of a type normally sought by litigants as a last resort, weighs heavily in our determination that the relationship between Utah and the litigation supports the exercise of jurisdiction by the Utah Court.

622 P.2d at 347 (emphasis added). The Utah court thus substituted its perceived interest in the litigation and in providing a forum for respondent instead of focusing on the required minimum contacts between petitioners and Utah. Such a shift in focus is expressly forbidden by *Savchuk*:

> The justifications offered in *Seider* jurisdiction share a common characteristic: They shift the focus on the inquiry from the relationship among the defendant, the forum, and the litigation to that among the plaintiff, the forum, the insurer, and the litigation.... The state's interest in providing a forum for its residents and in regulating the activities of insurance companies are substituted for its contacts with the defendant and the cause of action.... In other words, the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated. Such an approach is forbidden by International Shoe and its progeny.

444 U.S. at 332-33 (emphasis added). Even assuming the interests of the forum state are relevant in a due process analysis, the Utah court admits that its only legitimate interest is in securing an opportunity to its residents for legal redress. The Utah court acknowledges that respondent has had two such previous opportunities — in the Federal District Court for Utah and in the Colorado state court. If

two prior opportunities are insufficient to satisfy this interest, then the Utah court is giving that interest far too much weight in the due process context.

The keystone of the due process analysis applied by the Utah court was its finding that petitioners owned and farmed land within Utah. However, the Utah court acknowledged that ownership and use of this land were unrelated to the action brought by respondent. 622 P.2d at 346-7. In a clear boot-strap of logic, the Utah court reasoned that because attachment of the land was allowed, it was, therefore, of "interest" in the case:

> The land, ultimately, is what is at stake, because it is out of the land — and only to the extent of the value of the land — that plaintiff can, if successful, seek satisfaction of her judgment. Thus, the interest of defendants in their land located in Utah is, in a very real sense, the prime issue.

622 P.2d at 347. Whether ownership of real property within a state, unrelated to the cause of action, is a sufficient contact to justify the exercise of jurisdiction without denying due process, has not been squarely resolved by this Court since *Shaffer*. However, in *International Shoe Co. v. Washington, supra*, this Court held:

> While it has been held, in cases on which appellant relies, that continuous activity of some sorts within the state is not enough to support the demand that the corporation be amendable to suits unrelated to that activity, (citations omitted), there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. (citations omitted)

326 U.S. at 318 (emphasis added).

The issue is thus whether the use of land by petitioners within Utah can be considered so "substantial" as to justify quasi in rem jurisdiction over them where respondent's claim is unrelated to the use of the land. In the instant case, the Utah Supreme Court made no finding as to the substantiality of the "use" by petitioners, nor does the record reflect any such finding by the trial court. The opinion merely states that "defendants farmed and otherwise used the land located in Utah." 622 P.2d at 346. Absent a finding that the "use" by petitioners of the real property within Utah is "so substantial" so as to alone make the exercise of jurisdiction as to these petitioners "reasonable," the decision violates due process standards. *International Shoe Co., supra.* Unless land ownership and use are found to be "so substantial" or "of such a nature," as to justify quasi in rem jurisdiction, the ownership of land in Utah by these petitioners cannot be distinguished from the insurance obligation attached by the plaintiff in *Rush v. Savchuk, supra*, nor can it be distinguished from ownership of stock in a Delaware corporation sequestered by plantiffs in *Shaffer*. As stated by this court in *Shaffer v. Heitner*, 433 U.S. at 212:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

Although the precise issue presented in this case is one of first impression, the law which has developed since *Shaffer*, guided by this court's decisions in *Rush v. Savchuk, supra*, and *World-Wide Volkswagon Corp. v. Woodson*, 444, U.S. 286 (1980), indicates that the decision in the instant case denies petitioner's rights of due process as now defined.

In *Nelepovitz v. Boatright*, 442 F. Supp. 1336 (D.C.S.C. 1977) the Federal District Court of South Carolina had to determine the issue now before this Court. In that case an action was brought by plaintiff, a South Carolina resident, under the state long-arm statute, to recover damages for injuries resulting from a fall that occurred in a house located in Missouri. The house was owned by defendants who also owned mortgaged real property in South Carolina where the action was brought. Since the cause of action was also unrelated to the real property in the forum state, the court reasoned:

> "As such, in order for plaintiffs to establish personal jurisdiction over the out-of-state defendants, the cause of action must be maintainable under Section 802. That is, defendants' relationships [contacts] with South Carolina must be of such an enduring nature as to allow maintenance of a suit in the state for a cause of action which arose from activity outside of the state."

442 F. Supp. at 1339 (emphasis added). The court then held:

> "[I]f 'plaintiffs' injury does not arise out of something done in the forum state, then other contacts between [defendant] and the state must be fairly extensive before the burden of defending a suit there may be imposed upon it without offending 'traditional notions of fair play and substantial justice.' "

442 F. Supp. at 1339 (emphasis added). In addition to the ownership of real property, one of the defendants in *Nelepovitz* was a limited partner in a South Carolina partnership. The court futher assumed that income was derived from the partnership. As to the ownership and "use" of the real property, the court found that defendant was personally making monthly payments on the mortgage. Based on these facts, it was held that there were insufficient contacts with South Carolina to support jurisdiction for a cause of action arising

outside the state and unrelated to the contacts with the forum.

This is the proper analysis for the instant case as well. However, instead of requiring that the contacts with Utah be "so substantial" or "of such enduring nature," where they are unrelated to the cause of action, the Utah court merely considered them as "contacts,".

The Due Process Clause contemplates other safeguards which are threatened by the decision in the instant case. As stated by this Court in *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. at 292:

> [I]t [Due Process] acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.

The decision of the Utah Supreme Court not only deprives petitioners personal due process guarantees, but threatens the fabric of our federal system. The danger comes not from the fact that jurisdiction was invoked, but from the type of due process analysis adopted. Any reading of the court's opinion reveals that it was more concerned with its own interests in the litigation and in providing a forum than with observing due process restraints on the exercise of jurisdiction over non residents. Such an analysis is a throw-back to the discarded rationale of *Pennoyer v. Neff*, 95 U.S. 714 (1878). It is clearly a maverick approach to the exercise of jurisdiction in a sensitive and interdependent federal system of sovereign states.

Among the factors which this Court in *World-Wide Volkswagon Corp.*, held should be considered in a due process challenge to the exercise of state court jursidiction are: "The interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies." (444 U.S. at 272) The result of the Utah

Supreme Court's disregard of its proper place in the federal system is, standing alone, an important denial of due process. Again, as stated in *World-Wide Volkswagon Corp.*, 444 U.S. at 273:

> "The sovereignty of each state, in turn, implied a limitation on the sovereignty of all of its sister states — a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.
>
> Hence, . . . we emphasize that the reasonableness of ass[illegible]ing jurisdiction over the defendant must be assessed 'in the context of our federal system of government,' *International Shoe Co. v. Washington, Supra*, at 317, 90 L.Ed. 95, 66 S. Ct. 154, 161 ALR, 1057, and stressed that the Due Process Clause ensures, not only fairness, but also the 'orderly administration of the laws,' (Citation omitted). (Emphasis added)

A Writ of Certiorari should issue in the instant case because of the denial of petitioners' due process rights. The Utah court in applying the "minimum contacts" test denies petitioners' personal due process rights as the law has been developed. Also, the analysis adopted by the Utah court is a danger to the federal system of co-equal sovereign states.

II.

THE DECISION OF THE UTAH COURT VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.

In addition to the important due process issues already raised, the decision in the instant case totally disregards the integrity of the Full Faith and Credit Clause of Article IV, Section 1, of the United States Constitution.

The Full Faith and Credit Clause constitutes an express constitutional mandate for the extraterritorial recognition and enforcement of sister state judgments. The purpose of the full faith and credit clause was stated in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), to be:

> [To] establish throughout the federal system the salutory principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered.... It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the other, by making each an integral part of a single nation, in which rights judicially established in any part are given nationwide application.... Because there is a full faith and credit clause, a defendant may not a second time challenge the validity of a plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or greater recovery.

320 U.S. 439-440. (Emphasis added) See also *Durfee v. Duke*, 375 U.S. 106 (1954).

Prior to pursuing the Utah action, respondent filed a wrongful death claim in the Colorado state court. The Colorado court held that respondent's claim was barred by the Colorado two-year statute of limitations. (R. 30-34) The Colorado court specifically found that the two-year limitation period was a substantive part of the Colorado wrongful death statute which created the right of action and which contained within its provisions the two-year limitation period. (R. 32) Respondent's action was therefore dismissed. That judgment of dismissal was not appealed and remains final.

Contrary to the judgment of the Colorado court in this controversy, the Utah court found that the Colorado statute of limitations was procedural and not substantive. Therefore, the Utah court held that "since a judgment based on the running of a local statute of limitations is not a bar to a subsequent action based on the same facts in a sister state, plaintiff is not barred under the full faith and credit clause from bringing suit in Utah." 622 P.2d at 349.

The Utah court erred in its treatment of the full faith and credit issue. In this very case, the Colorado court itself ruled that its statute of limitations was substantive, not procedural, and dismissed the action. (R. 30-34) Although the Utah court recognized that "in determining whether the statute of limitations found within the Colorado Wrongful Death Act is substantive or procedural, we look to the characteristics attributed to the statute by Colorado decisions," 623 P.2d at 349 it nonetheless ignored the judgment of dismissal of the Colorado court.

The greatest affront to the Full Faith and Credit Clause in the Utah court's decision is its interpretation and use of this Court's decision in *Wells v. Simmonds Abrasive Co.*, 345 U.S. 514 (1953). The Utah court relies on this case as authority for its right to disregard the judgment of the Colorado court. *Wells* does not support the holding of the Utah court. This Court in *Wells* rather clearly held that one state is not compelled to apply a sister state's statute of limitations even where that statute of limitations can be said to be substantive. 345 U.S. at 517-518. This is a choice of law rule. The important distinction which the Utah court fails to make is that *Wells* was not addressing the situation before it, that is, where a judgment has already been rendered in a sister state based on that state's own substantive statute of limitations. This is what compels application of the Full Faith and Credit Clause to give finality and meaning to the Colorado judgment. And it is in this regard that the Utah court has misapplied *Wells*.

III.

THE FINDINGS BY THE UTAH SUPREME COURT THAT RESPONDENT IS A UTAH RESIDENT, AND AS TO THE NATURE AND EXTENT OF PETITIONERS' USE OF LAND IN UTAH, ABSENT AN EVIDENTIARY HEARING, DENIES PETITIONERS' DUE PROCESS RIGHTS.

The decision in the instant case relies heavily on the "finding" that respondent and her husband were Utah residents. This fact is an important underpinning of the court's due process analysis in the exercise of jursidiction as well as being a prerequisite to the application by the Utah court of the Utah "borrowing statute." It is the application of the borrowing statute with its exception in favor of Utah citizens that is used to circumvent the Colorado two-year statute of limitations and that sister state's judgment of dismissal.

In petitioning for rehearing in this case, it was strenuously argued that not only was this finding unsupported by the record in this case, but that this issue had never been litigated in the trial court. Even respondent in her reply brief to the Utah Supreme Court recognized that this factual issue had not been litigated: "This court [Utah Supreme Court] should exercise its discretion to remand this matter to the lower court for the much-needed factual elaboration of the sensitive and unsettled jurisdictional question at issue." (Reply Brief, p. 30.)

Similarly, the Utah court simply found that the real property in Utah belonging to petitioners was "farmed and otherwise used." There was no evidence taken on the nature or extent of the farm operations engaged in and nothing of an evidentiary nature to explain how petitioners "otherwise used" the land. Indeed, the entire issue of petitioners involvement and connection with the land in Utah has never been at issue in an evidentiary hearing.

The resolution of these critical factual issues by the Utah Supreme Court without a prior evidentiary hearing is a denial of petitioners' procedural due process rights. *Baldwin v. Hale*, 68 U.S. 223 (1864). The right to a hearing has long been recognized by this Court under both the Fourteenth and Fifth amendments and although the exact form of the hearing may vary, a deprivation of a property right requires prior evidentiary hearings. *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1949); *Londoner v. City & County of Denver*, 210 U.S. 373 (1907); *Windsor v. McVeigh*, 93 U.S. 274 (1876).

In *Armstrong v. Manzo*, 380 U.S. 545 (1965), plaintiff brought a motion before a Texas state court to set aside a decree of adoption of his natural daughter. The court, pursuant to Texas statutory law, had granted the decree without prior notice to Mr. Armstrong or granting opportunity to present evidence to counter the claim that he had failed to provide support for a period of over two years. This Court reaffirmed that "a fundamental requirement of due process is the opportunity to be heard." 380 U.S. 552. Also, *Grannis v. Ordean*, 234 U.S. 385 (1914).

In particular, this Court in *Armstrong* recognzied that the opportunity to be heard and present evidence must be given at a "meaningful time and in a meaningful manner." 380 U.S. 552. Although plaintiff there did receive an evidentiary hearing, the Court held that due process was denied because the stage in the litigation when the hearing was allowed placed plaintiff at a disadvantage, by shifting to him the burden of proof:

> [T]he petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge.

380 U.S. 551. Petitioners have not only been disadvantaged by the findings on residency and as to "use" of the Utah land, but there has been an absolute denial of an opportunity to present evidence on these issues. The "findings" made by the Utah Supreme Court on appeal, will constitute law of the case, and become binding in this action unless a writ of certiorari is granted.

Furthermore, it cannot be argued in the instant case that petitioners' due process rights have not been abridged because the continued viability of the attachment of their real property depends on a resolution of respondent's underlying action. Indeed, this Court has held that the Due Process Clause protects any significant property interest or substantial rights. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Goldberg v. Kelly, supra.* As stated in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); a temporary, non-final deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment.

POINT IV.

APPLICATION OF THE UTAH PRE-JUDGMENT ATTACHMENT STATUTE DENIED PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS.

Jurisdiction in the instant case was conferred pursuant to the Utah pre-judgment attachment statute, Rule 64C, Utah Rules of Civil Procedure. The history of this rule's involvement in this controversy is as follows: In the first action brought by respondent against these petitioners, the Tenth Circuit per curiam decision mentions this rule. In that decision, the Tenth Circuit held that under the due process clause petitioners could not be subjected to in personam jurisdiction in Utah. As a separate point, the Tenth Circuit also ruled that "jurisdiction cannot be sustained by the attachment of defendant's property in Utah." (Unpublished per curiam decision p. 6) This resulted because Rule 64C, as it was then before the Tenth Circuit, required that the cause of action arise in Utah.

Before the Tenth Circuit decision was handed down, but after the attachment obtained by respondent in the federal action, the Utah rule was amended. The amendment eliminated the language which the Tenth Circuit held required that the cause of action arise in Utah. The effective date of this amendment was November 1, 1972. The order of dismissal in the Federal action was entered in September, 1973.

The instant case and the Colorado state action were then filed July 19,1974. Jurisdiction in this case was obtained by attachment of petitioner's real property under Rule 64C. The trial court vacated the writ of attachment holding that it was an improper method to obtain jurisdiction in wrongful death actions where the tort arose outside the state. (See Rhoades I; 552 P.2d at 132.) Respondent appealed that decision. On appeal, petitioners argued as separate grounds for affirming the trial court, that the Utah attachment law is unconstitutional under the U.S. Supreme Court decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972). Specifically, petitioners argued that they were denied their due process rights for lack of a pre-attachment hearing. However, the Utah Supreme Court in Rhoades I, did not address the procedural due process issue as raised, but nonetheless reinstated the writ of attachment.

In *Fuentes* the Supreme Court declared that the replevin statutes of Florida and Pennsylvania were unconstitutional because they provided for deprivation of property without procedural due process by denying the basic right of a hearing before chattels were taken from their owner. The Supreme Court held that a hearing was required under the Due Process Clause of the Fourteenth Amendment in all cases, recognizing only certain "extraordinary situations" as exceptions. In this regard, the court stated:

> There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing... These situations, however, must be truly unusual. Only in a few limited situations has

> this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important government or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in a particular instance.

407 U.S. at 90-92 (emphasis added).

As a result of the decision in *Fuentes*, courts considering the constitutional sufficiency of state attachment procedures have consistently adopted a two-fold test: (1) is there a substantial deprivation of a property right, and (2) does the case constitute an "extraordinary situation" as recognized in *Fuentes*. As to the first inquiry, it is clear in the instant case that the attachment of petitioner's real property constitutes a substantial deprivation of a property right. To be such a "deprivation" does not require that the property be actually "seized," or physically removed from possession or control of the owner. This court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), recognized that a temporary, non-final deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment.

More particularly, attachment of real property was held to constitute a substantial deprivation in *Bay State Harness Horse Racing and Breeding Assn. v. PPG Industries, Inc.*, 365 F.Supp. 1299 (D.Mass. 1973). In that case, plaintiffs had attached real property of defendants as security for a possible judgment to be obtained based on a breach of contract action. The court in that case rejected the contention that an attachment, by encumbering defendant's real property, did not constitute a "taking" of property. The court stated:

> Viewing the attachment as a non-possessory lien... or as merely an encumbrance or cloud on the title... the interest created by the attachment operates as a superior interest against subsequent purchasers, mortgages or attaching creditors, and thus restricts the owner's ability to sell or mortgage the property at its full value. The determinative impact of the attachment is that it deprives the owner of a property right or interest significant not only to him in his use of the property, but to the attaching party as well.
>
> * * *
>
> We therefore conclude that the Massachusetts attachment procedures applicable to real estate, when invoked, do effect deprivation of a significant property interest of the owner without notice or opportunity to be heard.

365 F.Supp. at 1304-06 (emphasis added).

An "extraordinary situation" is not present in this case which would justify attachment without prior hearing. Although it may be argued that where attachment is used as a means of conferring jurisdiction over a res where in personam jurisdiction cannot be had, such an extraordinary situation exists, this position can no longer be supported. The most frequently cited case in support of this position is *Ownbey v. Morgan*, 256 U.S. 95 (1921). That decision upheld the constitutionality of a Delaware attachment statute which prevented the entry of appearance in defense by a nonresident defendant whose property had been attached, except on the posting of special bail. While the actual holding of *Ownbey* upheld the bail requirement, it has been cited often for its dictum which has been said to approve the attachment without prior hearing.

Ownbey has been limited on the basis of its narrow holding in In Re Law Research Services, Inc., 386 F.Supp. 749, 753 (S.D.N.Y. 1974). This has also been the suggestion of legal scholars; see Note, Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L.J. 1023 (1973) at 1030-31.

Regardless of how *Ownbey* is construed, more recent cases have extended the pre-attachment hearing requirement against non-resident defendents. The most notable of these is *Fuentes* itself.

The decision by this court in *Shaffer v. Heitner, supra*, renders *Ownbey* impotent. The *Ownbey* rationale relies on the pre-*Shaffer* due process distinctions of in rem, quasi in rem and in personam. Those distinctions were eliminated in *Shaffer*, which held that "all assertions" of state court jurisdiction must be measured by the "minimum contacts" test. 444 U.S. at 327. This Court also recognized that it is pure fiction to maintain that the exercise of jurisdiction over a non-resident's property is anything but jurisdiction over the individual. 433 U.S. at 212. Under the new standard of *Shaffer*, there is no longer a valid exception to the pre-attachment hearing requirement, where it is to confer jurisdiction over a non-resident.

In addition to *Fuentes* and *Shaffer*, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Court not only held a garnishment statute unconstitutional, but set forth standards which required pre-attachment hearing in such cases as the instant one. In *Di-Chem*, this Court held that the Georgia procedures were constitionally insufficient because, among other reaons, there was no provision for an early hearing to require the creditor to show probable cause for the garnishment. 419 U.S. at 607.

Jonnet v. Dollar Savings Bank of New York, 530 F.2d 1123 (3d Cir. 1976), deals directly with the problem of pre-attachment hearings where used as a means of conferring jurisdiction over a non-resident. The court there considered

the constitionality of Pennsylvania summary procedures for jurisdictional attachment of property belonging to a foreign corporation. Plaintiffs there invoked the attachment procedures alleging that Dollar Savings Bank of New York wrongfully failed to honor a mortgage commitment for $1,100,000. Plaintiffs then attached property of two corporate garnishees who were indebted to Dollar Savings in a total amount of over $1,300,000, and who were obliged to make monthly installment payment to Dollar Savings in amounts over $10,000. As a result, the monthly payments were not made to Dollar Savings. Defendant then challenged the Pennsylvania procedures as unconstitutional in that they denied procedural due process rights for failure to provide adequate notice to the defendant prior to attachment and opportunity for a prompt hearing to challenge the attachment. The court there discussed the continued viability of *Ownbey* in light of *Fuentes* and other more recent decisions:

> [I]t is apparent that the holdings, if not the language, of *Fuentes, Mitchel* and *Di-Chem* cast serious doubt on *Ownbey's* current strength. The Court's manifest concern with the fair procedures, whether by hearing or otherwise, to protect an individual or corporation from arbitrary or wrongful deprivations of any property for even a short period of time, reflects a changing view of due process much more attuned to the realities of present times than is the *Ownbey* justification of the bail requirement... *Fuentes, Mitchell* and *Di-Chem* reflect a growing sensitivity in concepts of fundamental fairness in administering justice, reasonable requirements in legal procedures and a realistic recognition of the enormous role played today by credit transactions in the consumer and commercial life of our complex economy. The rational of *Ownbey* is no longer in harmony with the principles of *Fuentes* and its progeny.

530 F.2d at 1128 (emphasis added). The court in *Jonnet* held the Pennsylvania foreign attachment procedures unconstitutional.

In the instant case, petitioners have never had an opportunity for a hearing on the attachment of their Utah property. Also, petitioners have never been granted an opportunity to post a reasonable bond in lieu of the encumbrance on their real property.

Under these cases the issuance of a writ of attachment against petitioners constitutes a denial of due process. Petitioners have never had an opportunity to contest the sufficiency of the affidavits in support of the writ or the underlying justification. Also, petitioners have not been given the reasonable alternative of posting a bond in lieu of the encumbrance on their real property. Finally, petitioners were not accorded an opportunity to show the absence of an overwhelming governmental interest in issuing the writ against a non-resident where all events giving rise to the cause of action occurred outside the forum state.

V.

WRIT OF CERTIORARI IS WARRANTED IN THE INSTANT CASE DUE TO IMPORTANT AND FAR-REACHING POLICY CONSIDERATIONS.

The questions presented in this petition are of importance in the development of due process standards in state-court exercise of jurisdiction over non-residents. The decision of this Court in *Shaffer v. Heitner* marked a turning point in the interpretation and application of the due process clause to state court jurisdiction. However, the *Shaffer* decision and its progeny have yet to resolve the specific question raised in this case. That is, whether a state court can exercise jurisdiction over a non-resident based on ownership of real property where ownership and use are unrelated to the action, and there has been no determination that the use was so sub-

stantial as to comply with the standards of fair play and substantial justice of *International Shoe* and *Shaffer*. This Court now has the opportunity to decide that important and far-reaching constitutional issue.

The decision of the Utah court is contrary to the ruling of the Tenth Circuit Court of Appeals. The Tenth Circuit held, under a minimum contacts analysis, that the exercise of jurisdiction would deny due process. The Utah court held it would not. Under Rule 17.1(b) of the Revised Rules of the Supreme Court of the United States, this is a situation warranting issuance of the writ.

Should the decision in the instant case be allowed to stand, it would constitute a precedent for other state courts to cite and follow in their dealings with non-resident owners of real property. The decision of the Utah court is erroneous and in direct conflict with *International Shoe, Shaffer*, and the related decisions of *Savchuk*, and *World-Wide Volkswagon*, and more directly in conflict with case law which has developed since *Shaffer* in other states and in the federal district and circuit courts. The need for uniformity of law in this area is self evident. If the "minimum contacts" standard has any meaning, it must be uniform and consistent among the various states.

The decision by the Utah Supreme Court also poses a substantial threat to the integrity of the federal system and the status of the states as co-equals in that system through its treatment of the full faith and credit issue. The Utah court ignored the decision by the Colorado state court that respondents' claim is barred. The Utah court, in disregarding this judgment of a sister state has placed its perceived interests above the necessity of giving effect to the Full Faith and Credit Clause. The dangers of balkanization of our system of federalism thus strongly urge that a writ issue in the instant case.

Finally, the question raised is of further importance because of the nature of the right involved and the regular, almost daily, impact, the exercise of jurisdiction over non-residents has in this country. Every State has some statutory basis for exercising jurisdiction over a non-resident. The danger of this decision must be multiplied by all 50 states. Thus viewed, the urgency for granting the writ in this case is clear.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

RESPECTFULLY submitted this 11th day of Aug. 1981.

STRONG & HANNI

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Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 72-1659 — JULY 1973 TERM

MILDRED RHOADES, Administratrix of the Estate of Claude Rhoades, Deceased,	)	
Appellee,	)	
v.	)	Appeal From The United States District Court For The District of Utah Central Division (D.C. # C-202-71)
JAMES C. WRIGHT, also known as JAMES CLIFFORD WRIGHT, and CLIFFORD WRIGHT and ESSIE WRIGHT, his wife,	)	
Appellants.	)	

P. Keith Nelson, Salt Lake City, Utah (Rex J. Hanson, and Hanson, Brandt & Wadsworth, Salt Lake City, Utah, with him on the Brief), for Appellants.

Arthur H. Nielsen, of Nielsen, Conder, Hansen and Henriod, Salt Lake City, Utah, for Appellee.

Before PHILLIPS, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

This is an interlocutory appeal from an order of the United States District Court for the District of Utah, Central Division, denying defendant-appellants' motion to dismiss for lack of personal jurisdiction over appellants.

The facts giving rise to this case are as follows: Plaintiff's decedent, Claude Rhoades, lived about three-quarters of a mile on the Utah side of the Utah-Colorado border. He was a farmer and farmed land that he owned in Utah and land that he leased in Utah and Colorado.

Defendant, James Wright, lived about two miles on the Colorado side of the Colorado-Utah border with his parents, who are also defendants, Clifford Wright and Essie Wright. He is also a farmer and farmed land belonging to himself and his parents both in Colorado and Utah. The properties of the parties, if not adjoining, were at least in close proximity.

Claude Rhoades had been married to a cousin of James Wright, from whom he was divorced in 1966. The property settlement provided that Anita, the first Mrs. Rhoades, was to receive a share of the profits from crops grown on certain land. Apparently, there was some feeling that each of the two men was keeping an eye on the other as regards the success or failure of the crops, who visited whom, and so on. In the late afternoon of April 19, 1970, all parties were out inspecting portions of their farmland, Claude Rhoades with his second wife, Mildred Rhoades, appellee herein, and James Wright with his parents, Clifford and Essie Wright. It appears that Claude Rhoades overtook the appellants and

pulled his pickup truck over in such a way as to make appellants stop. He and appellee got out of the truck. Claude Rhoades approached appellants' car on the driver's side and spoke to James Wright words to the effect of "Get off my back." Thereupon James Wright shot and killed Claude Rhoades. At the time of the shooting, the parties were on the Colorado side of the Utah-Colorado border.

After James Wright was found guilty of first-degree murder by a Colorado court and jury, and was sentenced to life imprisonment, he transferred his Utah property to his parents, allegedly for no consideration. Plaintiff's deceased then filed this wrongful death action in the United States District Court for the District of Utah, Central Division, as a diversity action. The appellants were served with process in Colorado. Appellee also sought and obtained a writ of attachment on the Utah property that James Wright had transferred to his parents.

The trial court found, based on the Utah Long Arm Statute, that the court had personal jurisdiction over the appellants. The case was then certified for interlocutory appeal.

The trial court's conclusion that there was personal jurisdiction under the Utah Long Arm Statute, Utah Code Anno. 1953 Supp., 78-27-24, was based on its view that economic injury in Utah which resulted from the shooting in Colorado was sufficient to support such jurisdiction. The trial court also stated that the exercise of jurisdiction would not violate due process standards because it was reasonably foreseeable that the act would cause injury in Utah, and it was fair in view of the contacts the defendants had with Utah.

The Utah statute (78-27-24) enumerates the acts which will give rise to jurisdiction. This includes "the causing of any injury within this state whether tortious or by breach of warranty...." As indicated, the trial court concluded that the economic injury in Utah resulting from the death of Claude Rhoades in Colorado was sufficient. As authority, the court cited *Gray v. American Radiator & Standard*

Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761. The cited case concerned a faulty valve on a water heater which was shipped into Illinois. Jurisdiction was sustained, and the case stands for the proposition that in a products liability case, Illinois permits jurisdiction to be based on a single event or accident in the state although the negligent device was made elsewhere. Other states have reached different results. But in any event, the products liability cases and the single act statutes relate to quite different concepts and purposes not particularly helpful here. Under the record before us, we have no geographic separation between the elements which make up the cause of action. It was complete in but an instant, and at the place where decedent was standing. An economic effect in Utah could be found for any tort committed anywhere against a Utah resident or business. The place where the damages may have ultimately been felt is not the place of the "injury" contemplated by the Utah statute. The "injury" there described is the cause of action injury. Here, as indicated, all the events relating to the cause of action itself occurred at one place and at one time. The consequences, economic and otherwise, were serious and were rather widespread, but this is not sufficient for the purposes of the long arm statute.

The economic consequences are also not sufficient to meet the due process requirements. The arguments here combine foreseeability, doing business, and product liability concepts. The trial court held that the due process requirement was met because it was fair to have jurisdiction asserted by Utah since defendants had farms there and apparently went into Utah for other purposes frequently. However, this is not sufficient under these non-business related circumstances, where all elements of the cause occurred as they did.

The Utah Supreme Court in *Hydroswift Corp. v. Louie's Boats & Motors, Inc.*, 27 Utah 2d 233, 494 P.2d 532, considered the effects of a conversation in Oregon on the plaintiff in Utah. The court said that under such circumstances, it would be a denial of due process to permit such an extention of *Pennoyer v. Neff*, 95 U.S. 714, and of *International Shoe*

Co. v. State of Washington, 326 U.S. 310. Also the court said that Utah jurisdiction would not be extended to a tort, as there concerned, ".... or a slander or the like in a sister state, but not in Utah, on grounds of denial of due process of law." We fully agree with such analysis, and apply it to the facts in this action.

Jurisdiction cannot be sustained by the attachment of defendants' property in Utah. The matter of "injury to the person" or "personal injury" is required, and again the state procedure (Rule 64c of Utah Rules of Civil Procedure) contemplates that the causes of action arise in Utah. The same considerations here apply as discussed above.

The case must be reversed with directions to dismiss the action by reason of lack of personal jurisdiction.

IN THE DISTRICT COURT WITHIN AND FOR
THE COUNTY OF DOLORES
STATE OF COLORADO

Civil Action No. 1223

MILDRED RHOADES, individually and as surviving widow of Claude Rhoades, deceased,	)	
Plaintiff,	)	
-vs-	)	JUDGMENT
JAMES C. WRIGHT, also known as JAMES CLIFFORD WRIGHT, and CLIFFORD WRIGHT and ESSIE WRIGHT, his wife,	)	
Defendants.	)	

This matter came on for hearing February 21, 1975, on Defendants' Motion for Summary Judgment. After Defendants' counsel had made his oral argument, Plaintiff's counsel asked and received additional time to file a supplementary brief, and Defendants were granted time to reply thereto.

The Court having now examined the file, heard the arguments of counsel, read all the briefs and being now fully informed in the premises makes the following findings:

The issue presently before the Court is:

Was the Plaintiff's complaint filed in apt time?

Plaintiff says it was; Defendants say it was not.

The facts concerning, which there is no conflict are:

1. Claude Rhoades was killed on April 19, 1970 in Dolores County, Colorado, by a bullet from a gun fired by Defendant James Clifford Wright.

2. Mildred Rhoades, as administratrix of his estate, filed suit against these Defendants in the United States District Court for the State of Utah on September 9, 1971. This action was dismissed without prejudice September 19, 1973 on the ground that said United States District Court had no jurisdiction.

3. On July 29, 1974, Mildred Rhoades filed the within action individually and as surviving widow of the deceased.

4. The statutes of the State of Colorado, specifically 1963 C.R.S. 41-1-2 control the nature of the action, the persons entitled to bring the action, and the nature of the recovery regardless of the place of trial.

5. Under said statute where an action is brought by the representative of the decedent's estate, recovery is limited to funeral bills, etc.

6. However, under said statute when the action is brought by the surviving spouse, the amount of damages is not controlled and the recovery is divided between the widow and the surviving heirs.

7. 1963 C.R.S. 41-1-4 now known as 1973 C.R.S. 13-21-204 provides that wrongful death actions

> "shall be brought within two years from the commission of the alleged negligence resulting in the death for which suit is brought."

8. If the aforesaid provision is controlling Defendants are entitled to summary judgment of dismissal.

9. Plaintiff contends that 1963 C.R.S. 87-1-29 (also known as 1973 C.R.S. 13-80-128) tolls the limitation set out in paragraph 7 above.

Thus it is clear that the only issue to be determined at this time is an issue of law.

The wrongful death action is a statutory action. Renewal Statutes such as 1963 C.R.S. 87-1-29, are uniformly held applicable only to Common Law actions, which the within action is not.

The 1963 Statute giving rise to wrongful death actions, is in an entirely different chapter from that in which the Renewal Statute is found.

In the 1973 codification, these statutes are in entirely different articles. An analysis of 1963 C.R.S. 87-1-29 and 1973 C.R.S. 13-80-128, which are identical, shows that each have three subparagraphs which clearly relate only to the limitations of actions which are found in 1963 C.R.S. Chapter 87-1 and Article 13-80 of 1973 C.R.S.

1973 C.R.S. 13-80-128 provides

"(1) If an action is commenced within the period allowed by this article and is terminated because of lack of jurisdiction or improper venue, the Plaintiff or if he dies and the cause of action survives, his executor or administrator may commence a new action upon the same cause of action, within one year after the termination of the original action or within the period otherwise allowed by this article, whichever is later . . ." (Emphasis supplied)

(2) Not applicable

(3) This section shall be applicable to all actions which are first commenced in a federal court as well as to those first commenced in the courts of Colorado or of any other state and shall apply only to actions terminated on or after April 1, 1975. (Emphasis supplied)

Careful reading of this section (13-80-128) clearly indicates it relates only to the causes of action found in Article 13-80 1973 C.R.S. and to no other cause of action provided for in other statutes.

Thus it is not applicable to the wrongful death actions found in Article 13-21 1973 C.R.S., (Chapter 41-1 1963 C.R.S.)

Conclusions of law:

1. This action was not filed in this Court within two years from the death of decedent Claude Rhoades, which allegedly resulted from the act of James Clifford Wright on April 19, 1975.

2. The renewal statute 1963 C.R.S. 87-1-29 (1973 C.R.S. 13-80-128) is not applicable, and therefore did not toll the running of the limitation of time in which this action must be brought.

3. The Plaintiff in this action does not appear in the same capacity as did the Plaintiff in the Federal action; thus the relief available is different from that available in the Federal action, and therefore the parties and relief sought are different, and even assuming that 1973 C.R.S. 13-80-128 were applicable to wrongful death actions, this Plaintiff is not within its provisions.

4. There being no dispute as to the facts, and this action having been filed more than four years after the cause of action arose, the case should be dismissed.

IT IS THEREFORE ORDERED AND ADJUDGED that

1. This action be dismissed with prejudice.

2. Defendants shall recover their costs.

Done this 16th day of April, 1975.

BY THE COURT:

_____

Judge

APPENDIX B

IN THE

SUPREME COURT OF THE STATE OF UTAH

——ooOoo——

Mildred Rhoades, individually
and as Administratrix of the Estate
of Claude Rhoades, deceased,
Plaintiff and Appellant,

v.

FILED
November 26, 1980

James C. Wright, also known
as James Clifford Wright, and
Clifford Wright and Essie
Wright, his wife,

Defendants and Respondents.

Geoffrey J. Butler, Clerk

WILKINS, Justice:

This is an appeal from an order of the District Court of San Juan County dismissing plaintiff's complaint seeking damages for the wrongful death of plaintiff's husband.

The underlying facts surrounding the wrongful death action can be found *in extenso* in the opinion of this Court in *Rhoades v. Wright*, 552 P.2d 131 (1976) (hereafter *Rhoades I*). However, the following brief recitation of the facts is repeated here to provide the framework upon which decision of this case rests.

Plaintiff and her husband, Claude Rhoades, lived approximately three-quarters of a mile on the Utah side of the Utah-Colorado border. Mr. Rhoades farmed land that he owned in Utah and land that he leased in Colorado. Defendant James C. Wright lived about two miles on the Colorado side of the border with his parents, Defendants Clifford and Essie Wright. Wright farmed land owned by him and his parents both in Colorado and Utah.

Because of the location of the lands each owned and farmed, both Rhoades and Wright moved back and forth across the border frequently. On April 19, 1970, all of the parties herein were inspecting portions of their respective farms. On a country road in Colorado and within a few miles of the border, James Wright shot and killed Claude Rhoades.

On September 19, 1971, plaintiff commenced a wrongful death action in the United States District Court for Utah alleging diversity jurisdiction and personal jurisdiction over defendants under the Utah Long-Arm Statute, Section 78-27-24, et. seq.[1] That suit was subsequently dismissed without prejudice on September 19, 1973, after appeal to the Tenth Circuit Court of Appeals on the ground that the United States District Court could not exercise personal jurisdiction over the defendants based on the Long-Arm Statute. [2]

Thereafter on July 29, 1974, plaintiff commenced simultaneous wrongful death actions in the Colorado District Court for Dolores County and the Utah District Court for San Juan County.

Defendants were subsequently granted summary judgment by the Colorado court dismissing plaintiff's complaint based on the running of the Colorado statute of limitations

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1. All references are to Utah Code Ann., 1953, as amended, unless otherwise noted.
2. Unpublished *per curiam* decision filed July 23, 1973.

applicable to wrongful death actions. The dismissal occurred prior to this Court's decision in *Rhoades I*.

In *Rhoades I* we reversed an order of the District Court vacating a writ of attachment on defendant's Utah property, holding that the attachment was a proper method of conferring jurisdiction.

After remand of *Rhoades I*, defendants filed in the Utah District Court a motion for an order quashing service of process or, alternatively, dismissing the plaintiff's complaint. As bases for this motion defendants alleged that (1) plaintiff lacked standing, (2) the District Court lacked jurisdiction, and (3) plaintiff's claim was barred by the Colorado statute of limitations. In granting the motion to dismiss, the District Court in its memorandum decision (1) ruled that plaintiff did have standing, (2) deferred ruling on the jurisdictional issue, and (3) ruled that plaintiff's claim was governed by the Colorado statute of limitations for wrongful death actions and "under the substantive law of Colorado no cause of action exists."

On appeal defendants have not questioned the ruling of the District Court as to plaintiff's standing, and we therefore do not address that issue. Defendants do urge as an alternative basis for affirming the order of dismissal that federal due process requirements preclude the exercise of jurisdiction by the Utah Court. Plaintiff urges this Court to adopt new choice-of-law principles with respect to multi-state wrongful death actions which would result in the application of Utah law, rather than Colorado law, to this case.

I.

In *Rhoades I*, this Court ruled that the Utah court could properly exercise jurisdiction in this case based on the attachment of property owned by defendants and situated in Utah. Defendants now urge that the intervening case of *Shaffer v. Heitner*, 433 U.S. 186 (1977) dictates that the

exercise of quasi in rem jurisdiction of the type involved in this case[3] is no longer constitutionally permissible under the Due Process Clause of the Fourteenth Amendment. We hold that the exercise of quasi in rem jurisdiction in this case comports with the requirements of due process for the reasons noted *infra*.

The Court in *Shaffer* held that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe [Co. v. Washington*, 326 U.S. 310 (1945)] and its progeny."[4] In *International Shoe*, the Court held that a state may exercise jurisdiction over a non-resident defendant only if the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463."[5]

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3. As explained in n. 17 of *Shaffer*, the Supreme Court there chose to use the term "in rem" to describe both in rem and quasi in rem jurisdictions. In quoting *Hanson v. Denckla*, 357, U.S. 235, 246, n. 12 (1958), the *Shaffer* Court did acknowledge the distinctions in these types of jurisdiction. That quote from *Hanson* stated:

> "A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5-9."

The instant case involves quasi in rem jurisdiction of the second type.

4. 433 U.S. at 212.

5. 326 U.S. at 316.

Shaffer involved the exercise of jurisdiction by the Delaware courts based on the sequestration of stock in a Delaware corporation, which stock was deemed, pursuant to Delaware statute, to be present in Delaware. The sequestration procedure was used in *Shaffer* to require certain officers and directors of the subject Delaware corporation, who were also stockholders, to submit themselves to personal jurisdiction in Delaware for the purpose of defending a stockholder's derivative suit. The Supreme Court held that this procedure violated the process due defendants where those defendants had no minimum contacts with Delaware other than the ownership of stock in a Delaware corporation. And as was pointed out, *ante,* in so holding the United States Supreme Court imposed the same due process requirements on the exercise of in rem and quasi in rem jurisdiction that had previously been set forth in *International Shoe* as requirements for the exercise of in personam jurisdiction.

One may sense force in the argument that the application of the *International Shoe* standard to all exercises of state court jurisdiction effectively eliminates quasi in rem jurisdiction of the type involved in this case.[6] However, we conclude that if the Supreme Court had intended to declare such jurisdiction constitutionally impermissible, it would have done so directly. Additionally, there are indications in *Shaffer* itself that the Court was of the view that quasi in rem jurisdiction has continued viability in certain situations.[7] In

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6. Cf. *Shaffer v. Heitner,* supra, 433 U.S. at 211, n. 31.

7. See, Id., 433 U.S. at 211, n. 37; and at 212, n. 39. See also Id. at 217, Powell, J., concurring; at 218, Stevens, J., concurring in the judgment; and Note, *Suggested Limitations on Application of In Personam Standards to State Jurisdictional Questions: A Critique of Shaffer,* 46 Geo. Wash. U. L.Rev. 581 (1979). The Court throughout *Shaffer* used the generic term "property." *Shaffer* involved stock certificates. The subsequent case of *Rush v. Savchuk,* 444 U.S. 320 (1980) involved a debt. The Court has not yet applied its analysis to a case involving real property.

our view, this case presents just such a situation. When we analyze the due process requirements laid down in *International Shoe* and *Shaffer*, together with the unique aspects of quasi in rem jurisdiction of the type involved here and the facts present here, we conclude that "traditional notions of fair play and substantial justice" are not offended by holding that the Utah courts may properly exercise jurisdiction.

As the Supreme Court stated in *Rush v. Savchuk*, 444 U.S. 320, 327 (1980):

> In determining whether a particular exercise of state court jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." (citing *Shaffer*, supra, 433 U.S. at 204)

We direct our inquiry, therefore, to those relationships in this case.

1. Relationship between defendants and forum — This element incorporates the "minimum contacts" requirement of *International Shoe*. Here, defendants are the owners of land situated in Utah.[8] While according to *Shaffer* the presence of property alone cannot support the exercise by this State of jurisdiction, the fact of ownership can "suggest the existence of other ties."[9] A further contact present in this case is the fact the defendants farmed and otherwise used the land located in Utah. We consider the presence of defendants' land — decidedly tangible and immovable — together with use of the land to be sufficient contacts by defendants with this State to support the exercise of jurisdiction.

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8. The record herein reflects that prior to the shooting in question the land was owned by James C. Wright. Thereafter, and apparently after his conviction in Colorado for murder, he conveyed the land in question to his parents, Clifford and Essie Wright, allegedly without consideration and for the purpose to defraud plaintiff as a potential creditor.
9. 433 U.S. at 209.

Furthermore, the ownership and use of land here by defendants provides that "purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, [and] reasonable."[10] Although there are some indications in Supreme Court opinions that this purposeful activity must relate in some way to the underlying litigation,[11] we believe that the primary focus remains on "traditional notions of fair play and substantial justice."[12]

At this point, the unique aspects of quasi in rem jurisdiction of the type involved here become vivified. While it is true that this action is for wrongful death, jurisdiction was asserted by the attachment of defendants' land situated in Utah. The land, ultimately, is what is at stake, because it is out of the land — and only to the extent of the value of the land — that plaintiff can, if successful, seek satisfaction of her judgment. Thus, the interest of defendants in their land located in Utah is, in a very real sense, the prime issue. And, since the ownership and use of defendants' Utah land are acts "by which the defendant[s] purposefully avail[ed themselves] of the privilege of conducting activities within the forum State thus invoking the benefits and protection of its laws,"[13] the exercise of jurisdiction by the Utah court is fair and reasonable.[14] Particularly where the ownership and use

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10. *Rush v. Savchuk, supra,* 444 U.S. at 329, citing *Kulko v. California Superior Court,* 436, U.S. 84, 93-94 (1978) and *Hanson v. Denckla,* 357 U.S. 235, 253 (1952).
11. *International Shoe,* supra, 326 U.S. at 320; *Shaffer,* supra, 433 U.S. at 213.
12. It must also be recognized that the requirement that the cause of action "arise out of" the contacts with the State is not present in a quasi in rem situation but is central to any determination of jurisdiction in the setting of the Utah Long-Arm Statute, § 78-27-24.
13. *Hanson v. Denckla,* 357 U.S. 235, 253 (1958), citing, *International Shoe,* supra, 326 U.S. at 319.
14. In both *Shaffer* and *Rush,* jurisdiction failed on this very issue, i.e., the Court found no contacts between the defendants and the forum.

of that land is coupled with the killing by Defendant James C. Wright of a Utah resident, defendants had every "reason to expect to be haled before a [Utah] court."[15]

2. Relationship between forum and litigation — This prong of the three-part due process test concentrates on Utah's interest, if any, in adjudicating this dispute.

The implicit interest of Utah is, of course, in assuring that heirs, either individually or through a personal representative have the opportunity to recover compensation for the wrongful death of a Utah resident.[16] As was stated in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957):

> It cannot be denied that [a state] has a manifest interest in providing effective means of redress for its residents . . .

Utah's interest is even stronger in this case because Utah must be viewed as the last forum available to plaintiff.[17] Plaintiff's interest in having her claim heard on its merits is in no way protected by her power to choose the forum because the Utah forum is the only one now available. We are mindful that plaintiff has attempted to litigate her claim both in the United States District Court for Utah and the Colorado District Court. However, in neither instance was plaintiff permitted to reach the merits of her claim. It cannot be denied that so far as this case is concerned, plaintiff has no other available forum. This fact, coupled with the fact that quasi in rem jurisdiction of the type involved here is jurisdiction of a type normally sought by litigants as a last resort,[18]

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15. *Shaffer v. Heitner, supra,* 433 U.S. at 216.
16. We find no merit in defendants' contention that plaintiff and decedent were not at the time of the shooting residents of Utah. They clearly owned land in Utah, farmed it, presumably paid taxes, and licensed their vehicles in Utah.
17. See, *Shaffer,* 433 U.S. at 211, n. 37.
18. This is so because plaintiff's recovery, if any, is limited to the value of the property attached.

weighs heavily in our determination that the relationship between Utah and the litigation supports the exercise of jurisdiction by the Utah court.[19]

3. Relationship between defendants and litigation — This element focuses on the relative convenience of the defendants in being required to appear and defend in the courts of Utah. Fairness and substantial justice again provide the touchstones for evaluation of this element.

The immediately apparent aspect of fairness in this regard is the procedural due process requirements of notice and opportunity to be heard.[20] In addition to the attachment of defendants' Utah real property, process was served on each defendant personally in Colorado. Defendants therefore have clearly had notice.

Once it is established that defendants have been afforded notice, we must examine whether they have been afforded a reasonable opportunity to be heard. That opportunity must be evaluated primarily in light of whether it would be inconvenient for them to be required to defend in the Utah courts. As stated by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980):

> The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." . . . Implicit in this emphasis on reasonableness is the understanding that the burden of the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.,* 335 U.S. 220, 223

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19. The Court in *Shaffer* and *Rush* found that in each case there was no connection between the litigation and the forum as well as a lack of minimum contacts between the defendant and the forum.

20. See, e.g., *Milliken v. Meyer,* 311 U.S. 457, 463 (1940).

(1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. Superior Court, supra,* at 92, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner,* 433 U.S. 186, 211, n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko v. Court, supra,* at 93, 98.

With reference to this case, we have already determined that Utah has a strong interest in adjudicating this dispute. We have also shown that the plaintiff's interest in obtaining convenient and effective relief is not protected by her power to choose the forum because she no longer has any such power. Finally, in our view, Utah and Colorado both have an interest in obtaining the most efficient resolution of controversies and that interest will be served by allowing plaintiff to present the merits of her case. No fundamental substantive social policy will be impaired by the exercise of jurisdiction by the Utah courts.

Additionally, the statement quoted above from *Woodson* recognizes that the foregoing three-part test, rather than being a set formula, is a balancing test. The application of the test in *Shaffer* and *Rush* showed that the exercise of jurisdiction was constitutionally infirm. (See nn. 12, 17, *ante.*) Here, though, we believe that application of the test leads to the conclusion that the Utah courts may constitutionally exercise quasi in rem jurisdiction.[21]

21. In their brief on appeal, defendants argue that the Tenth Circuit Court's determination that the Utah Federal District Court could not exercise jurisdiction based on the Utah Long-Arm Statute constitutes res judicata as to the jurisdictional issue presented here. A review of the record reveals that this contention was raised for the first time on appeal. Therefore, under well-established principles of judicial review we will not address that contention here.

II

Having made the determination that the exercise of jurisdiction by the Utah court is constitutionally permissible we move to the choice-of-law issue.

Defendants maintain initially that the judgment of the Colorado District Court must be given full faith and credit by the Utah courts pursuant to Article IV, Section 1 of the United States Constitution.[22] As the Full Faith and Credit Clause makes the doctrine of res judicata operative throughout the federal system,[23] we also consider under this analysis defendants' claim that the Colorado judgment is res judicata and bars plaintiff's Utah action.

It is clear that res judicata principles do not present a bar to this action and that the Colorado judgment is not dispositive of this case. It is well established that a state need not recognize a foreign judgment which is based merely on the running of the local statute of limitations.[24] This rule is generally restricted to statutes of limitation characterized as procedural rather than substantive.

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22. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved and the Effect thereof."

23. See, e.g., *Durfee v. Duke*, 375 U.S. 106 (1963); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942), rehearing denied 315 U.S. 829; and, generally, 47 Am.Jur.2d, Judgments, § 1226.

24. *Titus v. Wells Fargo Bank and Union Trust Company*, 134 F.2d 223 (5th Cir. 1943); *Stokke v. Southern Pacific Company*, 169 F.2d 42 (10th Cir. 1948); *Western Coal and Mineral Company v. Jones*, 167 P.2d 719 (Calif. 1946).

In determining whether the statute of limitations found within the Colorado Wrongful Death Act is substantive or procedural, we look to the characteristics attributed to the statute by Colorado decisions.[25] Thus, Colorado has tolled its statute of limitations for minors in wrongful death actions pursuant to a tolling provision not appearing within the wrongful death statute itself.[26] This ruling is clearly predicated upon the proposition that the statute of limitations is procedural,[27] and inconsistent with a substantive characterization.[28]

Although the majority of jurisdictions consider the statutes of limitation governing wrongful death actions to be a substantive matter barring the right and not merely the remedy,[29] a procedural characterization affecting only the remedy is not without precedent. Numerous courts have interpreted wrongful death limitation periods as procedural in light of statutory time restrictions which appear within the actual wrongful death act, as well as without.[30]

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25. See *Wood & Selick v. Compaigne Generale, Tranalantique,* 43 F. 941 (2nd Cir. 1930).
26. Section 87-2-3 Colorado Revised Statutes (1963); § 13-81-103 Colorado Revised Satutes (1974); *Price v. Sommermeyer,* 584 P.2d 1220 (Colo. App. 1978).
27. *Gaudette v. Webb,* 284 N.E.2d 222 (Mass. 1972).
28. See, e.g., *Nicholson v. Lockwood Greene Engineers, Inc.,* 179 So.2d 76 (Ala. 1965); *Western Coal & Min. Co. v. Hise,* 216 F. 338 (8th Cir. 1914); *Goodwin v. Bodcaw Lumber Co.,* 34 So. 74 (La. 1902).
29. This result stems from the classification of wrongful death acts as statutory law in derogation of any common law right.
30. See, e.g., *Seely v. Cowley,* 12 Utah 2d 252, 365 P.2d 63 (1961); *Gaudette v. Webb., supra*; *Brookshire v. Burkhart,* 283 P. 571 (Okla. 1930); *Wohlgemuth v. Meyer,* 293 P.2d 816 (Cal. App. 1956).

Text writers as well have criticized the substantive characterization given to wrongful death statutes of limitation. For example, Professors Harper and James, in their treatise on torts, state:

> Today... there is no valid reason for special strictness in treating time limitations upon death actions. Such actions present no problems of preparation, or of the perpetuation of evidence, or of the need for repose, which set them apart from other accident cases, from the point of view of defendants. Wherever the question is an open one so far as statutory construction is concerned, it is submitted that the limitation period for death actions should be treated just as are general statutes of limitation for personal injury and property damage actions. And legislatures might well be prevailed upon to remove distinctions which have been imbedded in the law of many of our states.[31]

Since a judgment based on the running of a local statute of limitations is not a bar to a subsequent action based on the same facts in a sister state,[32] plaintiff is not barred under the full faith and credit clause from bringing suit in Utah.

Even assuming that the statute of limitations for Colorado's wrongful death action is substantive, that fact would not, in light of *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517-518 (1953), call for a contrary result:

> The rule that the limitations of the forum apply (which this Court has said meets the requirements of full faith and credit) is the usual conflicts rule of

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31. 2 Harper & James, Torts 1296 (1956).
32. *Titus v. Wells Fargo Bank and Union Trust, supra*: *Stokke v. Southern Pacific Company, supra*: *Biewend v. Biewend*, 109 P.2d 701 (Cal. 1941).

> the states. However, there have been divergent views when a foreign statutory right unknown to the common law has a period of limitation included in the section creating the right. The Alabama statute here involved creates such a right and contains a built-in limitation. The view is held in some jurisdictions that such a limitation is so intimately connected with the right that it must be enforced in the forum state along with the substantive right.
>
> We are not concerned with the reasons which have led some states for their own purposes to adopt the foreign limitation, instead of their own, in such a situation. The question here in whether the Full Faith and Credit Clause compels them to do so. Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state. We see no reason in the present situation to graft an exception onto it. Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause. (Footnotes omitted.)

Wells applied the forum's shorter statute of limitations, thus dismissing an action which was not yet barred by the law of the foreign state upon which the wrongful death action was predicated. The instant case involves two identical statutes of limitation for wrongful death. The conflict arises from the Colorado court's refusal to apply the renewal statute, Section 13-80-128, Colorado Revised Statutes (1973), Section 87-1-29 Colorado Revised Statutes (1963), to a wrongful death action, an application which would have allowed the Colorado suit to be brought within one year of the dismissal of the federal action which was based on lack of jurisdiction. The Colorado court's decision not to apply that tolling procedure did not result from a substantive-procedural analysis, but rather was based simply on the fact

that the renewal provision applies by express statutory terms only to those actions commenced within the period allowed by the general statute of limitations provisions (Article 80), an article which does not include the period in which a wrongful death action must be brought. In applying the Utah limitation provision for wrongful death actions, a matter previously determined by this Court to affect the remedy and not the cause of action itself,[33] we hold that the Utah tolling statute applies and extends the time to bring suit to one year after the dismissal of the federal action, a limitation complied with in this case.[34] The consequences of applying our limitation period along with the tolling provision is to extend the time for bringing suit beyond that allowed by Colorado. The fact that the Utah wrongful death statute of limitations is not longer than that of Colorado warrants the application of the *Wells v. Simonds Abrasive Co.* holding to this case without extending its scope.

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33. *Switzer v. Reynolds*, Utah, 606 P.2d 244 (1980); *Seely v. Cowley, supra.*

34. Section 78-12-40 provides:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure. (Emphasis added.)

The Federal District Court action was commenced within two years of the death; was dismissed without prejudice for lack of jurisdiction and hence other than on the merits; and the subsequent Utah District Court action was filed within one year of that dismissal.

As for the additional time provided plaintiff by applying the tolling provision in this case, this result is totally consistent with Utah public policy evidenced by the exception found in Utah's borrowing statute[35] concerning resident plaintiffs:

> When a cause of action has arisen in another state... and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued. (Emphasis added.)

The borrowing statute, apart from the underscored exception, serves the purpose of preventing forum shoppers from flocking to Utah to take advantage of a longer limitation period, and thus precludes any adverse effect from the approach taken in this opinion.

The outcome further conforms with Utah's strong public policy regarding plaintiff's rights to bring a wrongful death action as stated in Article 16, Section 5 of the Utah Constitution:

> The right of action to recover damages for injuries resulting in death shall never be abrogated and the amount recoverable shall not be subject to any statutory limitation...

Finally, the application of our statute of limitations does not have the discriminatory effect of laying "an uneven hand" on causes of action arising within and without our State.[36] Full faith and credit does not demand that our estab-

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35. Section 78-12-45.

36. *Wells v. Simonds Abrasive Co., supra,* at 518. See, also, *First National Bank of Chicago v. United Air Lines,* 342 U.S. 396 (1952), rehearing denied, 343 U.S. 921; *Hughes v. Fetter,* 341 S. 609 (1951).

lished public policies expressed above submit to the law of a foreign state.[37]

Similar results have been reached by other courts by applying their own tolling provisions or express and implied exemptions to their borrowing statutes, rather than applying the limitation periods placed on wrongful death actions by the foreign state in which the death occurred.[38]

As to the extent of recovery, the fact that plaintiff in her capacity as administratrix under Colorado law might be limited in her recovery to burial expenses does not serve to place any limitations on her recovery here. Our wrongful death act,[39] places no limitation on recovery, allowing for "such damages . . . as under all the circumstances of the case may be just." Again, our statutory approach to the problem evidences a strong public policy against limitations being placed on damages. Since application of a foreign state's law limiting such damages would do violence to this policy, we are constrained to apply our own law concerning this matter.[40]

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37. *Nevada v. Hall,* 440 U.S. 410 (1979), rehearing denied, 441 U.S. 917; *Hughes v. Fetter, supra.*

38. See, e.g., *Furman v. General Dynamics Corp.,* 377 F.Supp. 37 (S.D.N.Y. 1974); *Coan v. Cessna Aircraft,* 293 N.E.2d 588 (Ill. 1973); *Knight v. Moline E.M. & W. Ry. Co.,* 140 N.W. 839 (Iowa 1913).

39. Section 78-11-7.

40. *Kilberg v. Northeast Airlines, Inc.,* 172 N.E.2d 526 (N.Y. 1961).

Our disposition of the issue concerning the effect of the Colorado judgment makes unnecessary an adoption of governmental interest analysis[41] as the choice-of-law approach for this jurisdiction as advocated by plaintiff. We therefore save that for another day.

In summary, we hold that jurisdiction in this case properly may be exercised by the Utah court, and the Colorado judgment does not bar litigation of this action in the Utah court. The judgment of the District Court is reversed and the matter remanded to that court for trial on the merits. Costs to Plaintiff.

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41. This approach is perhaps most clearly set out in a series of California Supreme Court decisions beginning with Justice Traynor's famous opinion in *Reich v. Purcell*, 432 P.2d 727 (1967), and followed, among others, by *Hurtado v. Superior Court*, 522 P.2d 666 (1974) and *Bernhard v. Harrah's Club*, 546 P.2d 719 (1976).

WE CONCUR:

J. Allan Crockett,
Chief Justice

Richard J. Maughan,
Justice

I. Daniel Stewart,
Justice

HALL, Justice: (Dissenting)

I respectfully dissent.

I disagree with the majority of the Court in its treatment of the full faith and credit issue and the doctrine of res judicata which makes it operative.[1]

Res judicata precludes the assertion of an entire claim which was or should have been raised in a prior action.[2] It is generally accepted in this, as in other jurisdictions, that the doctrine is properly applicable (1) as between the parties to the prior litigation; (2) where the prior action proceeded to judgment on the merits; and (3) where the subsequent dispute arises out of the same cause of action forming the basis

1. 47 Am.Jur.2d, Judgments, § 1226.
2. See *Belliston v. Texaco, Inc.*, Utah, 521 P.2d 379 (1974); *Bordeaux v. Ingersoll Rand Company*, 71 Wash. 2d 392, 429 P.2d 207 (1967).

of the prior litigation.[3] In rendering its decision, the Colorado Court concluded that the parties and relief sought in that case were different from the previously decided federal case. Therefore, the federal decision was not res judicata as to the Colorado suit. However, the crucial question is whether the Colorado suit is res judicata as to the instant Utah suit.

Applying the foregoing analysis, it is my opinion that the Colorado decision is res judicata and therefore bars the present action. Clearly the parties are the same. Furthermore, there has been a judgment on the merits. The Colorado Court ruled that the statute of limitations in an action for wrongful death in Colorado is substantive, not procedural,[4] inasmuch as the limitation period is contained within the very act providing for recovery.[5] Therefore, the failure to commence an action within the statutory period resulted in a loss of the right and the dismissal of the action is on the merits. Finally, the present claim arises out of the same cause of action forming the basis of the prior litigation. In each instance, the theory of recovery was damages for the alleged wrongful death of plaintiff's decedent.

Utah has traditionally adhered to the mandate of the full faith and credit clause that final judgments in sister states are to be given conclusive effect.[6] Hence, we should abide by

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3. *Wheadon v. Pearson*, 14 Utah 2d 45, 376 P.2d 946 (1962); *East Mill Creek Water Company v. Salt Lake City*, 108 Utah 315, 159 P.2d 863 (1945); *Mid-Continent Casualty Company v. Everett*, 340 F.2d 65 (10th Cir. 1965).
4. That Utah looks to the law of a sister state as to whether a matter is substantive procedure, see *Buhler v. Maddison*, 109 Utah 267, 176 P.2d 118 (1947).
5. For comparable holdings, see *Gatson v. B. F. Walker*, 400 F.2d 671 (5th Cir. 1968); *Bengston v. Nesheim*, 259 F.2d 566 (9th Cir. 1958); *California v. Copus*, 158 Tex. 196, 309 S.W.2d 227 (1958).
6. In Re Estate of Duquesne, 29 Utah 2d 94, 505 P.2d 779 (1973); *Intermountain Association of Credit Men v. Watterson*, 19 Utah 2d 212, 429 P.2d 818 (1967).

the Colorado decision which held that recovery for wrongful death was not warranted in the instant case. I would therefore affirm the trial court's decision.

Notwithstanding the foregoing, I deem it necessary to address two other points discussed by the majority.

My first concern is with the majority's treatment of Utah's borrowing statute.[7] I agree with the principle that if a person is a citizen of Utah he is entitled to the benefits of the statute.[8] However, such a determination is a factural matter to be decided by the trial court.[9] Although plaintiff's living quarters were located in Utah, she apparently considered herself to be a resident of Colorado. Plaintiff voted in Colorado,[10] received mail in Colorado and conducted her business in Colorado. In my view, there exists a factual question as to where plaintiff resided, upon which the trial court should have an opportunity to rule.

Second, I disagree with the majority's resolution of the issue as to jurisdiction. In *Shaffer v. Heitner,*[11] the United States Supreme Court held that to satisfy the demands of due process, the same standard applies for quasi in rem jurisdiction as for in personam jurisdiction. Therefore, the standard we have adopted with respect to our long-arm statute must apply. "Minimum contacts" is basically a factual

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7. U.C.A., 1953, 78-12-45.
8. *Allen v. Greyhound Lines,* Utah, 583 P.2d 613 (1978).
9. Id.
10. To vote in Colorado, a person must be a resident of Colorado, C.R.S., 1973, 1-2-101.
11. 433 U.S. 186 (1977).

matter best left to the trial court's determination, especially when it has expressly deferred ruling upon the questions of jurisdiction.[12]

At the very least, I would remand for a determination as to plaintiff's residency, and whether jurisdiction lies.

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12. Even plaintiff concedes that the jurisdictional questions should be remanded for further evidentiary hearing, inasmuch as she admits that the pleadings do not contain sufficient evidence to meet the *Shaffer* standard.

May 18, 1981

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Mildred Rhoades, individually and
as Administratrix of the Estate
of Claude Rhoades, deceased,

Plaintiff and Appellant,

v.

No. 16246

James C. Wright, also known as
James Clifford Wright, and Clifford
Wright and Essie Wright, his wife,

Defendants and Respondents.

This day petition for rehearing denied.

Geoffrey J. Butler, Clerk

cc: Duane A. Frandsen
Glenn C. Hanni
Philip R. Fishler

Opposition

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No. 81-288

In the Supreme Court of the United States

October Term, 1981

JAMES C. WRIGHT, et al,

Petitioners,

v.

MILDRED RHOADES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Utah Courts correctly exercise *quasi in rem* jurisdiction by finding that the killing of a person known to live in Utah by Petitioner James Wright, together with Petitioners' ownership and use of real property in Utah (and subsequent fraudulent transfer thereof) constituted sufficient "minimum contacts" to satisfy the requirement of *Shaffer v. Heitner*, 433 U.S. 186 (1977).

2. Whether the judgment of a Colorado trial court that Colorado's general statutory tolling provision is not applicable to the statute of limitations governing Colorado wrongful death actions is absolutely binding upon the Utah Supreme Court in applying Utah's statutory tolling provision to Respondent's action in Utah under Utah's wrongful death statute.

3. Whether the determination of the Utah Supreme Court, regarding Respondent's residence, based upon the record before it and the evidence and testimony adduced by Petitioners at a hearing, denies Petitioners' right of "due process."

4. Whether Petitioners may raise issues before this Court neither raised nor argued in the courts below.

5. Whether Petitioners' allegations are of sufficient merit or importance for this Court to issue a Writ of Certiorari.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 622 P.2d 343 (Utah ,1980) [*Rhoades II*, attached to Petitioners' Brief as Appendix "B"]. A prior opinion of the Utah Supreme Court in this case appears at 552 P.2d 131 (Utah, 1976) [*Rhoades I*, appended hereto as Appendix "C"].

STATEMENT OF THE CASE

Since Petitioners have omitted numerous substantive and procedural facts essential to a proper understanding of the decision of the Utah Supreme Court and of Plain-

tiff's claims, Respondent submits the following statement of the case:

Prior to 1970, Respondent Mildred Rhoades and her husband, Claude Rhoades, farmed land owned by Mr. Rhoades and located in Utah and land leased by Mr. Rhoades and located just over the border in the State of Colorado. Mr. and Mrs. Rhoades resided in Utah about three-quarters of a mile from the Colorado border. (R. 2, 20)

Their neighbor, Petitioner James C. Wright, lived about two miles from the border in Colorado. In 1970, and for years prior thereto, he farmed land which he owned and some land owned by himself and his parents. Most of the land was located in Utah contiguous to property owned by Mr. Rhoades. Only 25 acres of Wright's farm was located in Colorado. (R. 2, 20) Daily Mr. Wright traveled into Utah where he conducted his farming operation, his only occupation.

Mr. Rhoades had previously been married to the cousin of James Wright but was divorced from her in 1966. The property settlement provided that Wright's cousin, the first Mrs. Rhoades, was to receive a share of the profits from crops grown by Mr. Rhoades on his land in Utah. Apparently Petitioners made it a point to "keep an eye" on Mr. Rhoades' property and the crops grown by him on behalf of their relative. Some hostility developed between Mr. Rhoades and Petitioner James Wright because of this practice. (R. 20)

In the late afternoon of April 29, 1970, the Wright family and the Rhoades were out inspecting portions of

their respective Utah farms. Claude Rhoades was driving with his wife, Plaintiff-Respondent. James Wright was driving with his parents. The parties passed each other, after which Rhoades stopped and got out of his pick-up truck. Mr. Rhoades approached Petitioners' vehicle and told James Wright in effect that he (Wright) should desist his practice of checking up on the Rhoades. Whereupon, Petitioner James Wright produced a pistol and shot Claude Rhoades in the face, killing him instantly. (R. 21) At the time of the shooting the parties were on a portion of the road that happened to be just inside the Colorado side of the border. (R. 2, 10, 21)

James C. Wright was found guilty of first-degree murder by a Colorado jury. His conviction was reversed for prosecutorial comments prejudicial to his privilege against self-incrimination. *People v. Wright*, 182 Colo. 87, 511 P.2d 460 (1973). At a subsequent trial he was found not guilty by reason of insanity or temporary insanity. However, after his original conviction and sentence to life imprisonment, James Wright transferred his Utah farm property to his parents for no consideration whatsoever. (R. 2, 21)

Seventeen (17) months after the shooting, on September 19, 1971, Respondent Mildred Rhoades (herein sometimes referred to as the "Plaintiff") commenced a wrongful death action against Petitioners Wright (herein sometimes referred to as "Defendants") in the United States District Court in Utah, alleging diversity of citizenship and personal jurisdiction over Petitioners under the Utah "Long-Arm Statute," §78-

27-24, Utah Code Ann. (1953), *et seq.* (R. A-2, 2, 11, 21, 22) Concurrently, the Plaintiff levied a pre-judgment writ of attachment on the real property in San Juan County, Utah, which James C. Wright had conveyed to his parents by an ostensible "deed of gift" after his initial murder conviction. The Plaintiff alleged (and still contends) that said conveyance was made without consideration and with the intent to hinder, delay and defraud Respondent as a potential creditor in the pursuit of her wrongful death claims against James C. Wright. (R. A-2, 2, 11, 21) Petitioners were served with process, appeared through counsel, participated in discovery and actively litigated the jurisdictional questions raised in the Utah Federal District Court action. (R. 11, 22)

Following an interlocutory appeal, the Tenth Circuit Court of Appeals, in an unpublished, *per curiam* opinion filed July 23, 1973, held that the Federal District Court of Utah did not have personal jurisdiction over the Wrights under the Utah Long-Arm Statute. (R. 19-25; Petitioners' Brief, Appendix "A," p. 31) The Tenth Circuit decision was premised upon the Utah Supreme Court's decision in *Hydroswift Corp. v. Louie's Boats & Motors, Inc.*, 27 Utah 2d 233, 494 P.2d 532 (1972), and upon an interpretation of Rule 64C(a), U.R.C.P., as it read prior to its amendment, effective November 1, 1972. (R. 2, 24, 25; Petitioners' Brief, pp. 33, 34) At the direction of the Tenth Circuit, the Federal District Court dismissed Plaintiff's death action without prejudice on September 19, 1973. (R. 11, 25)

Within a year after this dismissal, on July 29, 1974,

Respondent commenced simultaneous death actions in San Juan County, Utah (R. A-1), and Dolores County, Colorado (R. 27). In the Colorado action, Plaintiff appeared in a different capacity as the "surviving widow of the deceased." (Petitioners' Brief, p. 37) Petitioners entered a general appearance and moved for summary judgment in the Colorado action. (R. 11) On April 16, 1975, the Colorado trial court dismissed the Colorado case on the grounds that the original statute of limitations (two years) had now run and the tolling or renewal provisions under the general Colorado statute of limitations article were not applicable to the statute of limitations in the article of the Colorado Code which contained the Colorado wrongful death act. (Petitioners' Brief, pp. 38-40)

Plaintiff pursued her action in the Utah District Court for San Juan County as the administratrix of the Estate of Claude Rhoades, the same capacity in which she had appeared in the federal court action. Her complaint alleges that the Defendant James Wright owned real property in San Juan County but that he had transferred it to his parents to avoid any obligation to the Plaintiff. Therefore, the Plaintiff requested the court to set aside the conveyance and satisfy the Plaintiff's claim from the farm ground. The Defendants' land in Utah was attached in conformity with Rule 64C, U.R.C.P.

In April, 1975, after receiving personal service of process, Defendants moved to quash service of process in the Utah case on the grounds (i) that the prior Tenth Circuit decision on the jurisdictional questions arising

under the Utah "Long-Arm Statute" and under Rule 64C(a), U.R.C.P., was *res judicata* and (ii) that even if the Tenth Circuit decision was not *res judicata* on these questions, the Utah courts should still reach the same result independently. The Utah District Court for San Juan County granted the Defendants' motion to quash in May, 1975. (R. 12)

On appeal to the Utah Supreme Court, that ruling was reversed in July, 1976. (*Rhoades v. Wright*, 552 P.2d 131 (Utah, 1976)) [Opinion appended hereto as Appendix "C" and herein referred to as *"Rhoades I"*] The Utah Supreme Court in *Rhoades I* held that while the Tenth Circuit decision was *res judicata* on the issue decided therein (e.g., personal jurisdiction under the Utah Long-Arm Statute), it was not *res judicata* as to the present attachment or as to the issue of *quasi in rem* jurisdiction over the Defendants.

Upon remand to the trial court, the Defendants again moved to quash service of process or in the alternative to dismiss. (R. 8) This time their motion was premised, *inter alia*, upon the claims that (i) the Dolores County, Colorado, judgment was *res judicata* on the issue of the statute of limitations; (ii) Plaintiff was barred by the Colorado statute of limitations; and (iii) the Utah court could not exercise *quasi in rem* jurisdiction given the new "minimum contacts" test for *quasi-in-rem* jurisdiction established in *Shaffer v. Heitner*, 433 U.S. 186 (1977). (R. 6-7, 13-18, 67-73)

Hearings were held by the court on April 5, 1978, and May 22, 1978, at which time Petitioners presented

evidence and examined witnesses regarding the Plaintiff's claims and Petitioners' defenses.

In August, 1978, the district court again dismissed the case, ruling that the Plaintiff's claim was governed by the Colorado statute of limitations for wrongful death actions. (R. 76-78)

On November 26, 1980, the Utah Supreme Court reversed this latter ruling of the lower court. *Rhoades v. Wright*, 622 P.2d 343 (Utah, 1980) (herein referred to as *Rhoades II;* opinion attached to Petitioners' Brief as Appendix "B"). The Utah court held, in *Rhoades II*, that (a) upon consideration of the relationship between the Defendants, the forum and the litigation, the exercise of *quasi-in-rem* jurisdiction over the Defendants' property is proper under the standards of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Shaffer;* (b) Petitioners' ownership, farming and other use of their land in Utah and the killing of Claude Rhoades are sufficient contacts by Defendants with the State of Utah to support the exercise of jursidiction; (c) the Colorado judgment is not *res judicata* on the issue of whether the Utah tolling provisions can be applied to toll the Utah statute of limitations from wrongful death. (*Id.*, pp. 54, 55)

Following denial of their petition for rehearing, the Defendants filed their Petition in this Court.

POINT I

THE EXERCISE OF *QUASI-IN-REM* JURISDICTION BY THE UTAH COURT SATISFIES

THE REQUIREMENTS OF *SHAFFER v. HEITNER.*

Petitioners claim that by affirming the exercise of *quasi-in-rem* jurisdiction over Petitioners' Utah property, the Utah Supreme Court misapplied this Court's standard in *Shaffer v. Heitner,* 433 U.S. 186 (1977); and *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). Yet it is Petitioners who misapply the carefully analyzed holding of the Utah court. In *Rhoades II,* 622 P.2d 343 (Utah, 1980), the Utah court weighed the contacts of the Defendants with the forum state and considered the "relationship among the defendant, the forum, and the litigation." *Rush v. Savchuk,* 444 U.S. 320, 327 (1980); *Shaffer, supra,* at 204.

Petitioners further interpret *Shaffer* to state that the result of a due process and minimum contact analysis is necessarily identical for *in personam* jurisdiction and *quasi-in-rem* jurisdiction. Yet this Court expressly refused to so hold and acknowledged that the presence of substantial property within the forum is a "contact" to be weighed in the due process context. *Shaffer, supra,* at 207-208, 211, n. 37. Contrary to Petitioners' assertions, the Utah court not only weighed this "contact," but also considered other significant ties between Petitioners and the forum. We quote:

> Here, defendants are the owners of land situated in Utah. While according to *Shaffer* the presence of property alone can not support the exercise by this State of jurisdiction, the fact of ownership can "suggest the existence of other ties." A further contact present in this case is the

> fact the defendants farmed and otherwise used the land located in Utah. We consider the presence of defendants' land—decidedly tangible and immovable—together with use of the land to be sufficient contacts by defendants with this State to support the exercise of jurisdiction.
>
> Furthermore, the ownership and use of land here by defendants provides that "purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, [and] reasonable." Rhoades II, 622 P.2d, at 346.

The Utah court also considered relevant to its consideration the Plaintiff's claim that after shooting Mr. Rhoades, James Wright conveyed his Utah land to his parents in an attempt to avoid any responsibility to the Plaintiff. *Ibid.* The court further observed that

> [W]here the ownership and use of that land is coupled with the killing by Defendant James C. Wright of a Utah resident, defendants had every "reason to expect to be haled before a [Utah] court." *Id.* at 347.

Respondent submits that Petitioners err when they claim that the result of the analysis of "fair play and substantial justice" must necessarily be the same in *quasi-in-rem* and *in personam* situations. The same analysis will lead to the same result if, and only if, the matter analyzed is the same. *Shaffer v. Heitner, supra,* and *Rush v. Savchuk, supra,* involved the most egregious assertions of *quasi-in-rem* jurisdiction imaginable—e.g., the assertion of jurisdiction over incorporeal property or a claim of presence within the forum by a mere legal fiction. *Shaffer, supra,* at 213; *Rush, supra,* at 328-29. Moreover, unlike *Shaffer,* this is a case where no other

forum is available to the Plaintiff. *Shaffer, supra,* at 211, n. 37. Nor is the Plaintiff attempting to assert personal jurisdiction over a corporate defendant halfway across the country as in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). James Wright farmed substantial property in Utah and was present in Utah daily. It is merely coincidence that the malicious shooting took place down the road and across the border in Colorado.

It is a function and responsibility of the state court to consider and weigh the contacts of the defendants and their relationships with the forum and the litigation within the broad guidelines of the Due Process Clause. The Due Process Clause does not require that the result of that process be the same in each state. The Utah court has cogently weighed the relevant interests and considered the Defendants' contacts with the state. The Utah court's determination that Petitioners' contacts and relationship to the forum are substantial and sufficient to exercise *in-rem* jurisdiction over the real property located within the forum is well justified. While Petitioners obviously disagree with that determination, they cannot deny the contacts they, in fact, had. Nor do Petitioners explain how "fair play and substantial justice" can possibly be served by preventing Respondent from having her day in court on the merits of her case.

Although their argument was rejected by the Utah Supreme Court in *Rhoades I, supra,* at 132, Appendix "C" (from which no appeal to this Court was attempted), Petitioners continue to argue that the earlier de-

cision of the Tenth Circuit Court of Appeals is *res judicata* on the question of minimum contacts for *in-rem* jurisdiction. *Rhoades I* stated that the preclusionary effect of the federal judgment is limited to the matters actually decided therein:

> It is well settled that a change in a governing statute, or rule of court, deprives a judgment, based on a former statute or rule of its conclusiveness. Consequently, the federal judgment is not res judicata as to the present attachment. It is also well established that a judgment dismissing an action for lack of jurisdiction is res judicata to that which was the subject of the judgment, but is not res judicata as to the merits of the action. *Id.*, at 133.

The issue decided by the Tenth Circuit was whether, under Utah law, the Federal District Court could exercise personal jurisdiction *under the Utah Long-Arm Statute*. That statute is not involved in the present case. The Tenth Circuit expressly relied upon the Utah Supreme Court's decision in the case of *Hydroswift Corporation v. Louie's Boat and Motors, Inc.*, 27 Utah 2d 233, 494 P.2d 532 (1972). (Petitioners' Brief, pp. 33, 34) Utah's judicial interpretation of the restrictive scope of its Long-Arm Statute has changed since then. See *Abbott G. M. Diesel Inc. v. Piper Aircraft Corp.*, 578 P.2d 850, 854 (Utah, 1978), which overruled *Louie's Boats*.

Respondent submits that the record before the lower court (including the deposition of James C. Wright) fully supports the conclusion that the Defendants purposefully availed themselves of the privilege of doing

business in Utah and thereby enjoyed the protections and benefits provided by that state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Utah Supreme Court properly determined that the forum state could exercise *quasi-in-rem* jurisdiction over Defendants' property consistent with due process.

POINT II

NEITHER THE FULL FAITH AND CREDIT CLAUSE NOR THE DOCTRINE OF *RES JUDICATA* PREVENTS THE UTAH COURTS FROM APPLYING THE UTAH STATUTORY TOLLING PROVISIONS TO THE STATUTE OF LIMITATIONS UNDER THE UTAH WRONGFUL DEATH ACT.

The essence of Petitioners' argument that the present action is barred by the Full Faith and Credit Clause (U.S. CONST., Art. 4, Sect. 1) is that *res judicata* precludes Utah from ever considering the merits of Plaintiff's claims, notwithstanding that during the long and litigious history of this case, no court has ever considered this case on its merits. Petitioners misstate the very terms of the Colorado judgment upon which they rely. Furthermore, Petitioners have indulged in a cavalier representation of the authorities applicable here.

In full, the Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. *And Congress may by general Laws prescribe* the Manner in which such Acts, Records and Proceedings shall be

> proved, *and the Effect thereof*. U.S. CONST. Art. 4, Sect. 1 (Emphasis added)

The mandate of the Full Faith and Credit Clause is extremely, even excessively, broad. Literal adherence to its mandate would frustrate its very purpose. Particularly as applied to the instant case where a conflict exists between the remedial statutes of two interested jurisdictions, the overly literal and automatic application of the Clause would be an absurdity. As Mr. Justice Stone observed:

> A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. *Alaska Packers Assoc. vs. Industrial Accident Comm.*, 294 U.S. 532, 547 (1935).

To understand the illusion of Petitioners' argument more completely, it is interesting to examine it more carefully. Initially, Petitioners mistakenly rely on *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) (Respondents' Brief, p. 28). However, they conveniently fail to mention that *Magnolia Petroleum* was a controversial 5-4 decision of the Supreme Court which was subsequently eviscerated and reversed *sub silentio* four years later in *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), which was a unanimous decision on virtually identical facts. Most recently, in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), a four-justice majority opinion (three justices concurring

in the judgment) expressly overruled *Magnolia*. While Petitioners' quote from Justice Stone in *Magnolia* may be fine as a general statement, it is not applicable here.

Petitioners omit any reference to *Nevada v. Hall*, 440 U.S. 410 (1979), reh. den. 441 U.S. 917 (1980), wherein the majority concluded simply that California need not accord the Nevada sovereign immunity statutes and attendant damage limitation full faith and credit if doing so would violate a "legitimate public policy" of the forum. 99 S. Ct. at 1186-87. See, also, *Alaska Packers Association v. Industrial Accident Comm., supra.* It is clear that the Utah court in *Rhoades II* gave effect to these decisions when considering Utah's public policy in applying its own tolling provisions to Utah's two-year statute of limitations for wrongful death. (*Rhoades II*, at 351-52; Petitioners' Brief, pp. 56-57):

> As for the additional time provided plaintiff by applying the tolling provision in this case [*Rhoades II*], this result is totally consistent with Utah public policy evidenced by the exception found in Utah's borrowing statute concerning resident plaintiffs:
>
> > When a cause of action has arisen in another state . . . and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, *except in favor of one who* has been a citizen of this state and who has held the cause of action from the time it accrued. (Emphasis added.) [Section 78-12-45, U.C.A., 1953]
>
> * * *

> The outcome further conforms with Utah's strong public policy regarding plaintiff's rights to bring a wrongful death action as stated in Article 16, Section 5 of the Utah Constitution:
>
> > The right of action to recover damages for injuries resulting in death shall never be abrogated and the amount recoverable shall not be subject to any statutory limitation. . . .
>
> Finally, the application of our statute of limitations does not have the discriminatory effect of laying "an uneven hand" on causes of action arising within and without our State. Full faith and credit does not demand that our established public policies expressed above submit to the law of a foreign state. *Rhoades II*, at 351.

Congress enacted enforcing legislation, Act of 1790, 1 STAT. 122 (1790), as amended, 62 STAT. 947 (1948) (*codified* 28 U.S.C. Sect. 1738 (1979)), which provides:

> . . . Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions *as they have by law or usage in the Courts of such State . . . from which they are taken.* (Emphasis added)

This provision makes it abundantly clear that the Colorado judgment at issue in this case need be given no broader effect in Utah than its own terms would require in Colorado. RESTATEMENT (SECOND) CONFLICT OF LAWS, Sect. 95 (1971). Indeed, it would be a blatant perversion of *res judicata* and a manifest denial of Full Faith and Credit to give recognition only to some parts of the Colorado judgment and not

to others. Hence, it is of paramount importance to consider precisely what the Colorado court held.

The Dolores County, Colorado, Court held that the Colorado renewal statute was not applicable to the statute of limitations for wrongful death actions because the provisions appeared in entirely different articles of the Colorado Code. (Petitioners' Brief, pp. 38-39) In addition, that court also held that the Plaintifff did not appear in the same capacity as in the federal action [and, subsequently, also in the San Juan County, Utah, case]; therefore, both the parties and relief sought were different and the renewal statute could not apply. (*Id.*, at 39-40) The capacity of Plaintiff in the instant San Juan County case and her cause of action under the Utah wrongful death statute are identical with that of the Federal Court action. Yet the Dolores County, Colorado, Court ruled that *this Plaintiff* and *this claim* are so materially different from those before it that it could not apply its tolling provisions to Colorado's wrongful death statute. It is difficult for Respondent to imagine, then, how that Judgment can constitute a bar to the present Plaintiff and her claim under the Utah wrongful death statute, whether by *res judicata* or Full Faith and Credit.

Petitioners erroneously claim that the Dolores County Court specifically found the Colorado two-year limitation is "a substantive part of the Colorado wrongful death statute." (Petitioners' Brief, p. 18) Nowhere does the Colorado decision justify any such implication. (*Id.*, at 37-40) Even so, since the period of limitation is two years in both Utah and Colorado, such a deter-

mination would be irrelevant. The issue before the Utah court was not whether Colorado's statute of limitation applied; but, rather, whether choice of law permits the Utah court to apply Utah law to Plaintiff's claim under the Utah wrongful death statute. If Utah law may apply, then the Utah courts may interpret and give effect to its own renewal or tolling statute.

There is nothing shocking or unusual about finding a judgment under foreign law, particularly a foreign limitations law, less than conclusive upon the forum courts. Indeed, Comment (b) to Sect. 110 of the RESTATEMENT (SECOND) CONFLICT OF LAWS, gives an example of such a result which is peculiarly apposite to this case:

> . . . the plaintiff's suit might have been dismissed in State X on the ground that it is barred by the X statute of limitations. This judgment will preclude the plaintiff from thereafter maintaining an action to enforce the claim in State X. This judgment, however, binds the parties only with respect to the issue that was decided. *It will preclude the plaintiff from maintaining an action to enforce the claim in another State only if the courts of the other state would apply the X statute of limitations either by reason of their own borrowing statute . . . or because the X statute of limitations is applicable under their choice-of-law rule.* (Emphasis added)

In this case Plaintiff submits that the application of the Utah tolling statute is proper both under Utah's Borrowing Statute and under the correct choice-of-law rules as applied by the Utah courts.

As correctly pointed out by Petitioners, this is a choice-of-law rule, not an issue of *res judicata*. (Petitioners' Brief, p. 19) Therefore, *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), is not only applicable but was persuasively applied by the Utah court. *Ibid*, at 53-55.

As noted, any "procedural-substantive" distinction was not decided by the Colorado lower court. *Rhoades II* correctly understood (and gave proper consideration to) the Colorado decision when it stated:

> The instant case involves two identical statutes of limitation for wrongful death. The conflict arises from the Colorado court's refusal to apply the renewal statute . . . to a wrongful death action, an application which would have allowed the Colorado suit to be bought within one year of the dismissal of the federal action which was based on lack of jurisdiction. *The Colorado court's decision not to apply that tolling procedure did not result from a substantive-procedural analysis*, but rather was based simply on the fact that the renewal provision applies by express statutory terms only to those actions commenced within the period allowed by the general statute of limitations provisions (Article 80), an article which does not include the period in which a wrongful death action must be brought. In applying the Utah limitation provision for wrongful death actions, a matter previously determined by this Court to affect the remedy and not the cause of action itself, we hold that the Utah tolling statute applies and extends the time to bring suit to one year after the dismissal of the federal action, a limitation complied with in this case. The consequence of applying our limitation period along with the tolling provision is to extend the time for bringing suit be-

> yond that allowed by Colorado. *The fact that the Utah wrongful death statute of limitations is not longer than that of Colorado warrants the application of the Wells v. Simonds Abrasive Co. holding to this case without extending its scope.* (Emphasis added) 622 P.2d at 350; Petitioners' Brief, at 54-55)

Moreover, *Rhoades II* properly looked to the Colorado case of *Price v. Sommermeyer,* 41 Colo. App. 147, 584 P.2d 1220 (1978), aff'd *en banc* 603 P.2d 135 (1979), in determining that the application of Colorado's tolling provisions to statutes of limitations is generally a procedural matter and not a substantive one in Colorado. The decision of Colorado's Supreme Court (in addition to the lack of any discussion in the Colorado decision) in no wise supports the repeated assertions by Petitioners that "the Colorado court itself ruled that its statute of limitations was substantive, not procedural, and dismissed the action." (Petitioners' Brief, p. 19) The Utah court did not "ignore" the Colorado judgment but gave it proper deference according to its terms.

POINT III

THE DETERMINATION OF THE UTAH COURT REGARDING RESPONDENT'S RESIDENCE IS SUPPORTED BY THE RECORD AND THE EVIDENCE ADDUCED BY PETITIONERS AND DOES NOT DENY THEM DUE PROCESS.

Petitioners complain that the Utah Supreme Court made an erroneous "finding" of Respondent's residency.

(Petitioners' Brief, p. 20) To support their claim, Petitioners purport to rely on Respondent's Reply Brief before the Utah Supreme Court. Petitioners neglect to observe that in the matter quoted, Respondent was not referring to her "residency" nor the Utah "borrowing statute" but rather to a further consideration of the effect of *Shaffer v. Heitner* by the lower court, if the Utah Supreme Court found it necessary.

Petitioners' claim that they had no "evidentiary hearing" on the issue of residency is just plain false. They had every opportunity to present their "facts" and evidence to the trial court. The San Juan County Court heard the arguments of counsel and received testimony and other evidence from Petitioners on April 5, 1978, and June 5, 1978. Transcripts of both hearings appear in the record below.

In fact, at the April 5, 1978, hearing, Petitioners' counsel was permitted to examine Mrs. Rhoades specifically regarding her residency. (Tr. 19-31) She testified then that she and her husband resided and lived in their home and ranch consisting of 320 acres located within the State of Utah. Mrs. Rhoades had not been a resident of Colorado since 1964. The Rhoades paid property taxes in Monticello, Utah. Mrs. Rhoades held a Utah driver's license and had a vehicle registered in Utah. They maintained no dwelling in Colorado and did not live there. Her contacts with Dove Creek, Colorado, for shopping, business and voting were for convenience purposes only. (April 5, 1978, hearing; Tr. 19-30) Petitioners also introduced exhibits such as the Plaintiff's

marriage and voting records and the decedent's death certificate. At the June 5, 1978, hearing on Petitioners' Motion to Quash, Petitioners' counsel argued that Mrs. Rhoades was not a resident, which argument was expressly rejected by the trial court.

Moreover, it should be noted that Plaintiff's Complaint alleges that she is a Utah resident. For purposes of considering a motion to dismiss or to quash for lack of jurisdiction, Plaintiff's allegations in her complaint are accepted as true. *U.S. v. Bureau of Revenue of State of New Mexico*, 291 F.2d 677 (10th Cir., 1961). See, also, *Allred v. Cook*, 590 P.2d 318, 319 (Utah, 1979).

As to Petitioners' claim of no hearing on the "finding" of their "use of the land," all of the facts stated in the Statement of the Case herein and in *Rhoades II* are found in the record below (including the deposition of James C. Wright in the Federal Court action wherein the Defendant testified regarding his farming and other contacts with the forum state).

Regardless of whether Petitioners are constitutionally entitled to a factual hearing on these "important determinations," they have already had at least two such hearings. The failure to enjoy an additional opportunity for hearing cannot be said to be sufficient reason for this Court to grant their Petition, particularly when the determination of law of which they complain is supported by the record below.

POINT IV

THE UTAH PREJUDGMENT ATTACHMENT RULE DOES NOT DENY DUE PROCESS TO PETITIONERS AND PETITIONERS MAY NOT RAISE ISSUES BEFORE THIS COURT NEITHER RAISED NOR ARGUED IN THE COURT BELOW.

Petitioners' claim that the "Utah Prejudgment Attachment Statute" (Rule 64C, U.R.C.P.) constitutes a denial of due process should be peremptorily rejected by this Court as an issue now raised but which was neither raised nor argued by Petitioners either in *Rhoades II* or previously in the San Juan County State Court. *City of East Lake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 671, n. 2 (1976); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

This issue is also moot since Petitioners have had both "an opportunity for" and hearings on the attachment of their Utah land. Their initial hearing was held at their request on May 14, 1975, the day after the land was attached. After the Utah Supreme Court's decision in *Rhoades I*, further hearings were conducted at Petitioners' request, as already discussed herein. More particularly, on April 5, 1978, Petitioners' counsel specifically raised and argued his objections to the sufficiency of both the affidavit supporting the writ of attachment and the bond posted by Plaintiff. Petitioners' attorney also requested an opportunity to establish certain facts by testimony and was permitted to examine Mrs. Rhoades at length (over the objection of Respondent's counsel).

Otherwise, since *Rhoades I*, no issue has ever been raised by Petitioners regarding the validity of Respondent's attachment. And since *Rhoades I*, Petitioners have never raised the unconstitutionality of Utah's attachment rule (Rule 64C, U.R.C.P.) as any issue or defense. Petitioners have never complained to the Utah court, as provided by Rule 64C(f)(4), U.R.C.P. that the subject attachment was improperly or irregularly issued.

Also, Petitioners allege they "have not been given the reasonable alternative of posting a bond in lieu of the encumbrance of their real property." Yet, Rule 64C(f) provides that they may obtain a release of the property "at any time" by their own filing of an undertaking. Petitioners have done nothing to take advantage of this provision.

Insofar as the merits of Petitioners' claim here that Rule 64C, U.R.C.P., is unconstitutional, Petitioners fail to mention that attachment in Utah (as well as garnishment and replevin) is also subject to compliance with Rule 64A, U.R.C.P., which provisions meet the requirements of this Court as set forth in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), regarding the availability of an immediate hearing, the sufficiency of the supporting affidavit and the manner of the issuance of such a writ.

Since Petitioners have not previously raised this issue on appeal and have had their hearings in court concerning the instant attachment, there is no reason for this Court to grant their Petition with respect to this matter.

POINT V

PETITIONERS' ALLEGATIONS ARE NOT OF SUFFICIENT MERIT OR IMPORTANCE FOR THIS COURT TO GRANT THEIR REQUEST FOR A WRIT OF CERTIORARI.

In their attempt to persuade this Court to grant their Petition, Petitioners ascribe pretentious and monumental consequences to this case. True, this case is one of great significance to the litigants, particularly to the Plaintiff, who still seeks justice in the only forum available to her for the shooting of her husband by James Wright. Yet there is nothing inherent in the decision of *Rhoades II* that portends the "dangers of balkanization of our system of federalism" or will multiply the bases of exercising jurisdiction in all fifty states, as suggested by Petitioners. Since the Utah Supreme Court's decision in *Rhoades I*, our nation has not been flooded with *quasi-in-rem* litigation to assert jurisdiction over nonresidents.

Respondent submits that the decision of the Utah Supreme Court is not contrary to this Court's rulings in *Shaffer v. Heitner, supra;* and *Rush v. Savchuk, supra.* Rather, the lower court has properly weighed the interests of the various concerns by application of the salient principles of these cases. Therefore, no conflict exists to justify the issuance of a writ of certiorari. Just because Petitioners may feel unhappy about the result reached by the Utah Supreme Court in *Rhoades II* does not present sufficiently "important and far-reaching constitutional issues" requiring this Court's attention. Their arguments of urgency are without support or substance.

Petitioners' objections to the Utah Court's determination to apply its own law is merely an objection to the application of state law by a state court and does not raise a "federal question" appropriate for review by this Court. Defendants' protestations of "far-reaching policy considerations" rings hollow when rationally considered with the issues as discussed herein.

There is no reason to grant the Petition for Writ of Certiorari in this action. Rather, the need is to finally proceed to a trial on the merits so that after almost eleven years, Respondent may have her day in court and be finally heard on the merits of her claims.

CONCLUSION

Petitioners' Petition for Writ of Certiorari is without merit and should be denied by this Court.

Respectfully submitted,

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APPENDIX C—Rhoades I, 522 P.2d 131 (Utah, 1976)

IN THE SUPREME COURT OF THE STATE OF UTAH

Mildred Rhoades, individually
and as Administratrix of the
Estate of Claude Rhoades, deceased,
Plaintiff and Appellant,

v.

James C. Wright, also known as
James Clifford Wright, and
Clifford Wright and Essie Wright, his wife,
Defendants and Respondents.

No. 14159

FILED July 8, 1976

Allan E. Mecham, Clerk

MAUGHAN, Justice:

On appeal is an order of the trial court vacating a writ of attachment; holding that an "attachment is an improper method to confer jurisdiction in a wrongful death case where the tort sued upon arose in another state"; and that the court had no in rem jurisdiction. We reverse and remand for reinstatement of the writ.

In 1970, Claude Rhoades and James Wright each farmed different parcels of land located in Utah and in Colorado. In April of that year, James Wright shot and killed Claude Rhoades within the state of Colorado. Wright was tried, found guilty, and sentenced to life im-

prisonment; after which, it is alleged, he transferred his Utah property to his parents, Clifford Wright and Essie Wright, for no consideration.

Plaintiff commenced the wrongful death action in the United States District Court for the District of Utah, Central Division, serving defendants with process in Colorado. Plaintiff also sought and obtained a writ of attachment on the Utah property which Wright had transferred to his parents.

The decision of the United States District Court that it had jurisdiction based on Utah's Long-Arm Statute was appealed and reversed, by the United States Court of Appeals, Tenth Circuit.

At the time of the appeal to the Circuit Court, our rule[1] provided for an attachment in an "action to recover damages for any tort committed by a nonresident of this state against the person or property of a resident of this state." This was the rule which the federal court had before it. Prior to the commencement of the present action, viz., July 19, 1974, Rule 64C(a) had been amended, and it read:

> The plaintiff, at any time after the filing of the complaint . . . in an action against a nonresident of this state, . . .

It is pursuant to the amended rule the attachment in the instant action was levied.

The subject rule is narrowly drawn, requiring allegation of one or more of seven causes for attachment, but

[1] 64C(a), U.R.C.P.

not in the alternative. These together with other limiting allegations, one of which prevents the attachment if the payment of the claim has been secured by any mortgage or lien on real or personal property. It also provides for a hearing, at the instance of the defendant, at any time, upon such notice to the plaintiff as the court may require. At which hearing the court passes on the justification for the writ. And this, of course, would be prior to the deprivation of any significant property interest. Under the facts in the instant matter, it is apparent the attachment was necessary to secure jurisdiction, which has been held to constitute a basic and important public interest.[2]

In the instant matter we consider neither the Long-Arm Statute nor Rule 64C(a) prior to its amendment. Such considerations were integral to the federal action, but are not present here.

It is well settled that a change in a governing statute, or rule of court, deprives a judgment, based on a former statute or rule, of its conclusiveness. Consequently, the federal judgment is not res judicata as to the present attachment.[3] It is also well established that a judgment dismissing an action for lack of jurisdiction is res judicata to that which was the subject of the judgment, but is not res judicata as to the merits of the action.[4]

The principal point raised on this appeal is the efficacy of the attachment to acquire jurisdiction for the

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[2] Ownbey v. Morgan, 256 U.S. 94, 65 L.Ed. 837, 41 S.Ct. 433, 17 A.L.R. 873(1921).
[3] 49 A.L.R.2d 1036, Sec. 2.
[4] Moore's Federal Practice, para. 41.14(a), pp. 1173-1174.

purpose of litigating plaintiff's claim against defendants.

This state, through its tribunals, may subject property owned by nonresidents, and situated within its boundaries, to the payment of the demands of its own citizens against nonresidents. Such an exercise of jurisdiction does not infringe upon the sovereignty of the state where the nonresident is domiciled. Every state has an interest in its citizens and owes them its protection; and it is a legitimate acquittal of this duty of protection to hold and appropriate any property owned by nonresidents to satisfy just claims of its citizens.[5] In Bristol v. Brent[6] this court said:

> In attachment proceedings against a nonresident defendant where personal service on him is lacking it is elementary that the court must obtain jurisdiction of the property of defendant. This in an ordinary attachment is obtained by seizure of it by the officer, and this seizure places the property in the custody of the law to be so held until the court determines whether or not a plaintiff in the action is entitled to judgment in the main case.

Section 66 of the Restatement 2d of the Conflict of Laws is as follows:

> A state has power to exercise judicial jurisdiction to apply to the satisfaction of a claim interests in a tangible thing that is subject to its judicial jurisdiction and belongs to the person against whom the claim is asserted, although the person himself is not subject to the jurisdiction of the state.

---

[5] Pennoyer v. Neff, 95 U.S. 714(1877).
[6] 36 Utah 108, 114, 103 P.1076(1909).

Any judgment obtained pursuant to this procedure reaches only so far as the res which has been attached, and only to the extent of its value; it does not impose a personal obligation upon the person against whom the claim is exercised, if he is not personally subject to the jurisdiction of the state.

The power of a state to exercise judicial jurisdiction, i.e., jurisdiction over the interests of persons in things, within the jurisdictional limits of the state, depends upon the relationship of the thing to the state. The power is there if the relationship of the thing to the state is of such a nature as to make the exercise of such jurisdiction reasonable. Where, as here, the thing is land, which by its nature is immovable, the state of the situs may reasonably exercise judicial jurisdiction against all persons to determine interests therein.[7] Reasonable notice to defendant is essential, and that it be clear the action is directed against the thing.

Here, it is well to make the distinction made in the more modern cases and treatises between jurisdiction in rem and jurisdiction quasi-in-rem. In the former some existing claim upon the thing itself is asserted. In a quasi-in-rem action a court will use its power over the property to provide a remedy for a claim not directly related to the thing itself.[8] The jurisdiction of the court to inquire into and determine the obligations of the nonresident is only incidental to its jurisdiction over the property.[9]

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[7] Restatement 2d of the Conflict of Laws, Sec. 56, p. 192.
[8] 1 Beale, Conflict of Laws, Sec. 106.1, p. 449(1935).
[9] Pennoyer v. Neff, ibid.

An interesting case similar to the one at hand is Wilcox v. Richmond, Fredericksburg & Potomac Railroad Co.[10] There a New York resident had attached property belonging to an out of state corporation. The United States District Court determined the attachment under attack was authorized by an existing New York rule; that under Rule 4(e), F.R.C.P. (as amended in 1963) the federal court was authorized to proceed with attachment. The court went on to say:

> Moreover, ever since Pennoyer v. Neff there has been no doubt but that the presence of property within a state provides a basis for that state's adjudicating any legally enforceable claim against the absent owner to the extent it can be satisfied out of the property on which jurisdiction was grounded. This traditional form of quasi in rem jurisdiction was approved in Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49L.Ed. 1023(1905), holding that, for purposes of garnishment, jurisdiction was proper wherever the debtor or garnishee could be found. Despite the drastic expansion of the permissible limits of in personam jurisdiction.

In Pennoyer[11] the court said:

> So the state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when nonresidents deal with them, it is

[10] 270 Fed. Supp. 454(1067).
[11] At pp. 723-724 of 95 U.S.

> a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresidents situated within its limits that its tribunals can inquire into that nonresidents' obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresidents have no property in the state, there is nothing upon which the tribunal can adjudicate.

Furthermore, as noted in Pennoyer, such views were not new at the time of the Pennoyer decision.

An interesting rationale supported by the mainstream of American life is found in Ownbey v. Morgan.[12] There the court had under consideration a Delaware statute concerning foreign attachments, and in the course of its opinion said:

> Our circumstances as a nation have tended peculiarly to give importance to a remedy of this character. The division of our extended domain into many different states, each limitedly sovereign within its territory, inhabited by a people enjoying unrestrained privilege of transit from place to place in each state, and from state to state; taken in connection with the universal and unexampled expansion of credit, and the prevalent abolishment of imprisonment for debt, would naturally, and of necessity, lead to the establishment, and, as experience has demonstrated, the enlargement and extension of remedies acting upon the property of others.

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[12] Footnote 2.

How much more appropriate that rationale is today than in 1921. The attachment levied in the instant matter is authorized under Rule 64C(a), as amended; thus is proper.

I CONCUR:

.....

R. L. Tuckett, Justice

CROCKETT, Justice: (Concurring)

This appeal challenges the granting of the defendant's motion to vacate the writ of attachment on real property, which was issued for the purpose of acquiring jurisdiction over the defendants, to sue for a tort the alleged wrongful death of Plaintiff's husband committed in Colorado. I realize the difficulties that may ramify if a plaintiff, by simply alleging a tort claim of any kind, spurious or otherwise, and the issuing of an attachment upon any property, e.g., a car, a trailer home of one traveling through the forum state, can thus obtain jurisdiction over a resident of another state. I therefore desire to limit my concurrence to the particular fact situation in this case.

It is unquestionable that the courts of this State can issue writs of attachment upon the grounds and under the procedure prescribed in Rule 64C(a) and that by doing so, the real property is taken within the present jurisdiction of the court, which then can be dealt with according to the rights the litigants assert in that

property. Notwithstanding the fact that the allegation is that the tort was committed in the state of Colorado, there is an additional aspect of this case which I think is of some significance. There is also involved in this action the allegation that the real property in Utah has been the subject of an illusory conveyance to the defendant's parents for the purpose of hindering, and defrauding the plaintiff in pursuing her remedy. In view of the dual aspects of the cause of action asserted by the plaintiff involving this real property I concur with the conclusion that the attachment should not have been vacated, and that the action is maintainable in our courts as one in rem against that property.[1]

In regard to the question whether the judgment in the federal court is res judicata, I think it is pertinent to observe that under our law any case may be commenced again within one year after a dismissal for any reason not on the merits.[2]

Henriod, Chief Justice, dissents.

Ellett, Justice, dissents.

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[1] See State ex rel. Boyer v. Superior Court, etc., 115 Wash. 359, 197 P. 321(1921).

[2] Sec. 78-12-40, U.C.A. 1953.

Petitioner's Reply Brief

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No. 81-288

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES C. WRIGHT, also known as JAMES CLIFFORD WRIGHT, and CLIFFORD WRIGHT and ESSIE WRIGHT, his wife,

Petitioners,

v.

MILDRED RHOADES, Individually and as Administratrix of the Estate of Claude Rhoades, deceased,

Respondent.

PETITIONERS' REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES C. WRIGHT, also known as JAMES CLIFFORD WRIGHT, and CLIFFORD WRIGHT and ESSIE WRIGHT, his wife,	
Petitioners,	
vs.	PETITIONERS' REPLY BRIEF
MILDRED RHOADES, Individually and as Administratrix of the Estate of Claude Rhoades, deceased,	
Respondent.	

Petitioners submit this Reply Brief in support of their Petition for a Writ of Certiorari to the Supreme Court of the State of Utah and by way of reply to Respondent's Brief in Opposition.

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PRELIMINARY STATEMENT

Although Rule 33(1)(e) of this Court's Revised Rules provides that typographic printing of this Reply Brief is preferred, this brief is submitted under Rule 33(1)(c). This process was made necessary due to the immediacy of the commencement of the Court's term, and the urgency to reply to Respondent's Brief in Opposition.

STATEMENT OF THE CASE

Petitioners strenuously object to the "facts" as stated by Respondent in her Brief in Opposition. The misstatements relate to the nature and extent of Petitioners' contacts with Utah, and are totally unsupported by the record in this case.

ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

I.

RESPONDENTS' BRIEF IN OPPOSITION MAKES RECORD STATEMENTS OF FACT WHICH ARE UNSUPPORTED BY THE RECORD IN THIS CASE.

As stated in the Petition for a Writ of Certiorari, the keystone of the due process analysis applied by the Utah Supreme Court was its finding that Petitioners owned and farmed land within Utah. Despite Respondent's efforts to show how the parties had prior disagreements regarding their various properties, Respondent cannot

and does not show that the ownership or use of Utah land by Petitioners is in any way related to her cause of action. The Utah Supreme Court acknowledges this at page 346 of its opinion. See Rhoades v. Wright, 622 P.2d 343, 346 (Utah 1980).

Because Respondent recognizes that Petitioners' Utah land is their only connection with that state, she has misstated the facts in an attempt to show a stronger relationship between Petitioners and the State of Utah than can be supported by the record. At pages 2 and 3 of Respondent's Brief in Opposition there are six instances of factual misstatements. Even the record page numbers to which Respondent cites do not support these "facts". Because the nature and extent of Petitioners' ownership and use of farmland in Utah is so critical in a "minimum contacts" analysis, the misstatements will be considered seriatum:

1. At page 2, Respondent claims that most of Petitioners' land is within Utah. In support of this, Respondent cites pages 2 and 20 of the record. Interestingly, page 2 of the record is the second page of Respondent's complaint filed in the Utah State Court. However, even here, there is no allegation that most of Petitoners' land is within Utah. Similarly, this "fact" is not a part of the Tenth Circuit's findings of fact which constitutes pages 19 through 25 of the record.

2. The statement that Petitioners' land is contiguous to Respondent's is not supported by the record. Respondent's complaint at page 2 of the record does not allege this nor is it a part of the Court of Appeals' findings at page 20 of the record.

3. The claim that only 25 acres of Petitioners' land is located within Colorado finds absolutely no support in the

record. Respondent does not allege this at page 2 of the record nor is it found at page 20.

4. Perhaps the most damaging misstatement is the claim that petitioner James Wright traveled to Utah "daily". Again, there is absolu_ely no support for such a claim in the record.

5. Respondent claims that Petitioner James C. Wright's only occupation was that of a farmer. This is not supported either by Respondent's complaint at page 2 of the record nor is it a part of the Tenth Circuit's findings at page 20.

6. Finally, the claim that at the time of the shooting Respondent, her husband, and Petitioners, were inspecting Utah property is contrary to the record in this case and is not supported by any citation provided by Respondent.

Without these "facts" the decision by the Utah court in effect holds that

ownership and any use of farmland in Utah will always confer in personam jurisdictions over nonresidents.

To show exactly what the record does provide on the question of petitioners' ownership and use of farmland in Utah, copies of pages 1 through 3 and 19 through 25 of the record are attached hereto as Appendix A. These pages are the only portions of the record cited by Respondent to support the above misstatement of fact.

II.

PETITIONERS' RELIANCE ON MAGNOLIA PETROLEUM CO. v. HUNT IS PROPER IN THIS CASE.

Respondent accuses Petitioners of misleading this Court by citing Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) as authority for the application of full faith and credit to the prior Colorado judgment. Respondent relies on Industrial Commission of Wisconsin v. McCartin, 330

U.S. 622 (1946) and Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) as authority that Magnolia has been overruled and cannot therefore apply in this case.

Petitioners cite Magnolia for the proposition that once a party has obtained an adjudication in a state court, the judgment is res judicata on that cause of action in the sister states. Neither McCartin nor Thomas alter this rule. This Court in Thomas noted that it was dealing in that case and in McCartin with decisions by administrative agencies. This Court found that there is a great difference between administrative agencies and state courts of general jurisdiction as to the effect of full faith and credit:

> But the critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.

> A final judgment entered by a court of general jurisdiction normally establishes not only the measure of the plaintiff's rights but also the limits of the defendants liability. A traditional application of res judicata principles enables either party to claim the benefit of the judgment insofar as it resolved issues the court had jurisdiction to decide.

448 U.S.281-282. The judgment of dismissal, entered by the Colorado State Court, a court of general jurisdiction, constitutes res judicata. The Utah court erred in failing to accord that judgment full faith and credit.

RESPECTFULLY submitted this 30th day of September, 1981.

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FILED

Jul 23 1973

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TENTH CIRCUIT

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 72-1659 - JULY 1973 TERM

MILDRED RHOADES, Administratrix of the Estate of Claude Rhoades, Deceased, Appellee, v. JAMES C. WRIGHT, also known as JAMES CLIFFORD WRIGHT, and CLIFFORD WRIGHT, and ESSIE WRIGHT, his wife, Appellants.	Appeal From The United States District Court For The District of Utah Central Division (D. C. # C-202-71)

P. Keith Nelson, Salt Lake City, Utah (Rex J. Hanson, and Hanson, Brandt & Wadsworth, Salt Lake City, Utah, with him on the Brief), for Appellants.

Arthur H. Nielsen, of Nielsen, Conder, Hansen and Henriod, Salt Lake City, Utah, for Appellee.

Before PHILLIPS, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

EXHIBIT "A"

This is an interlocutory appeal from an order of the United States District Court for the District of Utah, Central Division, denying defendant-appellants' motion to dismiss for lack of personal jurisdiction over appellants.

The facts giving rise to this case are as follows: Plaintiff's decedent, Claude Rhoades, lived about three-quarters of a mile on the Utah side of the Utah-Colorado border. He was a farmer and farmed land that he owned in Utah and land that he leased in Utah and Colorado.

Defendant, James Wright, lived about two miles on the Colorado side of the Colorado-Utah border with his parents, who are also defendants, Clifford Wright and Essie Wright. He is also a farmer and farmed land belonging to himself and his parents both in Colorado and Utah. The properties of the parties, if not adjoining, were at least in close proximity.

Claude Rhoades had been married to a cousin of James Wright, from whom he was divorced in 1966. The property settlement provided that Anita, the first Mrs. Rhoades, was to receive a share of the profits from crops grown on certain land. Apparently, there was some feeling that each of the two men was keeping an eye on the other as regards the success or failure of the crops, who visited

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whom, and so on. In the late afternoon of April 19, 1970, all parties were out inspecting portions of their farmland, Claude Rhoades with his second wife, Mildred Rhoades, appellee herein, and James Wright with his parents, Clifford and Essie Wright. It appears that Claude Rhoades overtook the appellants and pulled his pickup truck over in such a way as to make appellants stop. He and appellee got out of the truck. Claude Rhoades approached appellants' car on the driver's side and spoke to James Wright words to the effect of "Get off my back." Thereupon James Wright shot and killed Claude Rhoades. At the time of the shooting, the parties were on the Colorado side of the Utah-Colorado border.

After James Wright was found guilty of first-degree murder by a Colorado court and jury, and was sentenced to life imprisonment, he transferred his Utah property to his parents, allegedly for no consideration. Plaintiff's deceased then filed this wrongful death action in the United States District Court for the District of Utah, Central Division, as a diversity action. The appellants were served with process in Colorado. Appellee also sought and obtained a writ of attachment on the Utah property that James Wright had transferred to his parents.

The trial court found, based on the Utah Long Arm Statute, that the court had personal jurisdiction over the appellants. The case was then certified for interlocutory appeal.

The trial court's conclusion that there was personal jurisdiction under the Utah Long Arm Statute, Utah Code Anno. 1953 Supp., 78-27-24, was based on its view that economic injury in Utah which resulted from the shooting in Colorado was sufficient to support such jurisdiction. The trial court also stated that the exercise of jurisdiction would not violate due process standards because it was reasonably foreseeable that the act would cause injury in Utah, and it was fair in view of the contacts the defendants had with Utah.

The Utah statute (78-27-24) enumerates the acts which will give rise to jurisdiction. This includes "the causing of any injury within this state whether tortious or by breach of warranty. . . . " As indicated, the trial court concluded that the economic injury in Utah resulting from the death of Claude Rhoades in Colorado was sufficient. As authority, the court cited Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761. The cited case concerned a faulty valve on a water heater

which was shipped into Illinois. Jurisdiction was sustained, and the case stands for the proposition that in a products liability case, Illinois permits jurisdiction to be based on a single event or accident in the state although the negligent device was made elsewhere. Other states have reached different results. But in any event, the products liability cases and the single act statutes relate to quite different concepts and purposes not particularly h pful here. Under the record before us, we have no geographic separation between the elements which make up the cause of action. It was complete in but an instant, and at the place where decedent was standing. An economic effect in Utah could be found for any tort committed anywhere against a Utah resident or business. The place where the damages may have ultimately been felt is not the place of the "injury" contemplated by the Utah statute. The "injury" there described is the cause of action injury. Here, as indicated, all the events relating to the cause of action itself occurred at one place and at one time. The consequences, economic and otherwise, were serious and were rather widespread, but this is not sufficient for the purposes of the long arm statute.

The economic consequences are also not sufficient to

meet the due process requirements. The arguments here combine foreseeability, doing business, and product liability concepts. The trial court held that the due process requirement was met because it was fair to have jurisdiction asserted by Utah since defendants had farms there and apparently went into Utah for other purposes frequently. However, this is not sufficient under these non-business related circumstances, where all elements of the cause occurred as they did.

The Utah Supreme Court in Hydroswift Corp. v. Louie's Boats & Motors, Inc., 27 Utah 2d 233, 494 P.2d 532, considered the effects of a converstion in Oregon on the plaintiff in Utah. The court said that under such circumstances, it would be a denial of due process to permit such an extention of Pennoyer v. Neff, 95 U.S. 714, and of International Shoe Co. v. State of Washington, 326 U.S. 310. Also the court said that Utah jurisdiction would not be extended to a tort, as there concerned, " . . . or a slander or the like in a sister state, but not in Utah, on grounds of denial of due process of law." We fully agree with such analysis, and apply it to the facts in this action.

Jurisdiction cannot be sustained by the attachment of defendants' property in Utah. The matter of "injury to

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the person" or "personal injury" is required, and again the state procedure (Rule 64c of Utah Rules of Civil Procedure) contemplates that the causes of action arise in Utah. The same considerations here apply as discussed above.

The case must be reversed with directions to dismiss the action by reason of lack of personal jurisdiction.

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Attorneys for Plaintiff

Utah Supreme Court

In the Seventh Judicial District Court
In and for San Juan County, Utah
Filed July 29, 1971
Clytie Barber, Clerk
By Clytie Barber

IN THE DISTRICT COURT OF SAN JUAN COUNTY, STATE OF UTAH

MILDRED RHOADES, individually and as Administratrix of the Estate of Claude Rhoades, deceased,

Plaintiff,

v.

JAMES C. WRIGHT, also known as JAMES CLIFFORD WRIGHT, and CLIFFORD WRIGHT and ESSIE WRIGHT, his wife,

Defendants.

COMPLAINT

Civil No. 3672

Plaintiff complains of Defendants and alleges:

1. Plaintiff is a resident of the State of Utah and is the duly appointed, qualified and acting Administratrix of the Estate of Claude Rhoades, deceased, and brings this action on behalf of herself as the surviving widow of Claude Rhoades, deceased, and on behalf of his other heirs.

2. Defendants are residents of the State of Colorado.

3. On or about April 19, 1970, Defendant James C. Wright, also known as James Clifford Wright, wilfully and maliciously shot and killed Claude Rhoades, deceased.

4. At the time of said killing and in connection therewith, said Defendant was acting in concert with and as agent for the other Defendants who are his parents so that said Defendants were and are liable for the acts and conduct of the Defendant James C. Wright.

5. The said Claude Rhoades, deceased, left surviving him as his sole and only heirs at law Plaintiff Mildred Rhoades, surviving widow, and two adult children, Thomas Rhoades and Dianne R. Bullock.

6. Subsequently, on or about September 9, 1971, Plaintiff commenced an action against the Defendants in the United States District Court for the District of Utah, denominated Civil No. C-202-71.

7. Thereafter, on or about September , 1973, said action was dismissed by said Court without prejudice and other than on the merits, a copy of said Order and Judgment of Dismissal being attached hereto and incorporated herein by reference.

8. At the time of his death, the said Claude Rhoades, deceased, was of the age of 51 years, in good health, gainfully employed and was a kind, loving and devoted husband. As a result of his untimely death, Plaintiff, his widow, has been and will be deprived of the love, companionship, affection, services, advice and counsel of said decedent and the financial support and maintenance he would otherwise have provided. And decedent's heirs have been deprived of the inheritance which would otherwise have accrued to them and have otherwise sustained pecuniary loss by the death of their husband and father for which Plaintiff is entitled to recover the sum of $100,000.00 general damages.

9. By reason of said wilful and malicious conduct of Defendants, Plaintiff is entitled to punitive damages in the sum of $100,000.00.

10. At the time of the killing of the said Claude Rhoades, deceased, the said Defendant James C. Wright was the owner of real property located in San Juan County, State of Utah, from which the obligation owing to Plaintiff as herein set forth may be satisfied in whole or in part.

11. Subsequently, on or about December 1, 1970, Defendant James C. Wright, without consideration and for the intended purpose of avoiding his debts, and particularly the obligation owing to Plaintiff as herein set forth, and thereby defrauding his creditors, transferred and conveyed said property to the Defendants Clifford Wright and Essie Wright, husband and wife.

12. Said purported transfer and conveyance should be set aside and held for naught, and said property should be attached and held intact to satisfy to the extent possible the claims of Plaintiff as may be adjudged by the Court.

13. Pending a hearing on the merits of Plaintiff's claims, said property should be attached as provided by law and the rules of this Court for the purpose of securing Plaintiff in the payment of the judgment to be rendered herein.

14. The real property herein referred to is located in San Juan County, State of Utah, and is particularly described as follows:

Section 20: S½ of SW¼, SE¼;
Section 21: W½ of SW¼, NE¼ of SW¼;
Section 28: NW¼ of NW¼;
Section 29: W½, W½ of E½, NE¼ of NE¼;
Section 30: SE¼ of NE¼, E½ of SE¼, S½ of SW¼, SW¼ of SE¼,
Section 31: N½ of NE¼, N½ of NW¼, SW¼ of NW¼.
All in Township 36 South, Range 26 East, Salt Lake Base & Meridian.

WHEREFORE, Plaintiff demands judgment against the Defendants for the sum of $100,000.00 general damages, $100,000.00 punitive damages, together with Plaintiff's costs of court, to be satisfied from a sale of the real property hereinabove described, as provided by law, in the case of sale on execution; that the conveyance and transfer by Defendant James C. Wright to the other Defendants (of said property) be set aside and held for naught; and that pending the determination of this cause the Court issue an attachment against said property, thereby retaining it intact and subject to the order of this Court on final judgment.

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